(14)

No. 98-1167-CFX Title: Edward Christensen, et al., Petitioners
v.
Harris County, et al.

Docketed: January 21, 1999 Court: United States Court of Appeals for the Fifth Circuit

See also:
99-592

Entry	Date	Proceedings and Orders
	Jan 19 1999	Petition for writ of certiorari filed. (Response due February 20, 1999)
	Feb 19 1999	Waiver of right of respondents Harris Cty., TX, et al. to respond filed.
	Feb 24 1999	DISTRIBUTED. March 19, 1999
	Mar 4 1999	Response requested.
	Apr 5 1999	Brief of respondents Harris County, Texas, et al. in opposition filed.
	Apr 20 1999	REDISTRIBUTED. May 13, 1999
	Apr 27 1999	Reply brief of petitioners Edward Christensen, et al. filed.
	May 17 1999	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Sep 10 1999	Brief amicus curiae of United States filed.
	Sep 15 1999	REDISTRIBUTED. October 8, 1999
	Oct 12 1999	Petition GRANTED. limited to the following question: Whether a public agency governed by the compensatory time provisions of theFair Labor Standards Act of 1938, 29 U.S.C. 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time. SET FOR ARGUMENT February 23, 2000. **********
	Oct 26 1999	Record filed.
	Nov 5 1999	Record filed.
	Nov 9 1999	Order extending time to file brief of petitioner on the merits until December 3, 1999.
	Dec 2 1999	Brief amicus curiae of National Association of Police Organizations filed.
	Dec 3 1999	Brief amicus curiae of AFL-CIO filed.
	Dec 3 1999	Brief amicus curiae of International Association of Fire Fighters filed.
	Dec 3 1999	Brief amicus curiae of United States filed.
	Dec 3 1999	Joint appendix filed.
	Dec 3 1999	Brief of petitioners Edward Christensen, et al. filed.
	Dec 17 1999	CIRCULATED.
	Dec 20 1999	Order extending time to file respondents' brief on the merits to and including January 12, 2000.
	Jan 12 2000	Brief of respondents Harris County, Texas, et al. filed.
	Jan 12 2000	Brief amicus curiae of Spokane Valley Fire Protection filed.
	Jan 18 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 20 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

No. 98-1167-CFX

Entry	Date	Proceedings and Orders
		argument DISTRIBUTED.
	Jan 24 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 11 2000	Reply brief of petitioners Edward Christensen, et al. filed.
	Feb 23 2000	ARGUED.
	Mar 2 2000	Letter from counsel for the petitioner received and distributed.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD CHRISTENSEN, *et al.*,

Petitioners,

vs.

HARRIS COUNTY, TEXAS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act[1], as amended, 29 U.S.C. § 201 *et seq.*, ("FLSA") defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid in cash at time and a half the regular rate of pay. Under that section, a public employer may provide compensatory time in lieu of cash overtime when the compensatory time meets specific conditions.

The question presented here is whether under 1985 compensatory time amendments to the FLSA, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20-553.28, and the Secretary of Labor's considered interpretations and rulings thereon, a local governmental entity which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employer permitting such compulsion, compel employees to utilize or burn their accumulated compensatory time involuntarily, that is, when they do not request it?

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1. 9 U.S.C. § 207(o) (West 1985).

PARTIES TO THE PROCEEDING

In addition to Petitioner Edward A. Christensen, the following are members of the Harris County Sheriff's Department and are also Petitioners. They have been parties to the action since its inception. For convenience, they are referred to as "the Deputies."[2]

1. Edward A. Christensen
2. Kenneth O. Adams
3. David W. Addison
4. Jose A. Alvarado
5. Robert Amboree
6. Bobby G. Andrews
7. Randy Anderwald
8. Gary R. Ashford
9. Craig L. Bailey
10. Richard Bailey
11. Ricardo E. Baldoras
12. Herbert V. Barnard
13. Gerald Barnett
14. Paulette M. Barnett
15. Bridgett Blackman
16. Aynl E. Blackwell
17. Gary F. Blahuta
18. Scott P. Blakenburg
19. Deborah Bliess
20. Bruce H. Breckenridge
21. J.T. Brooks
22. Brian Buchannan
23. Patricia M. Bui
24. Don E. Bynum
25. Clarence A. Callis
26. William M. Campbell
27. Heather Carr
28. Thomas J. Carr
29. Paul E. Carpenter
30. Robert Casey
31. Mark E. Cervel
32. Eladio C. Chavez
33. Roy Clark
34. Denny P. Coker
35. Alford A. Cook
36. Gregory P. Cox
37. Donald D. Crayton
38. Richard D. Crook
39. David D. Davis
40. Gary W. Davis
41. Christopher E. Denny
42. Russell Duckes
43. Larry A. Eickhoff
44. Frank Fairly
45. David W. Finley
46. James P. Fitzgerald

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2. Lynwood Moreau, the initial lead Plaintiff, asserted individual claims which are not before this Court because he has withdrawn. *See*, Order granting Moreau's Motion to Withdraw Authorization of Counsel to Represent Him. (Docket #37-39) November 20, 1997.

47. Ernie R. Fowler
48. Michael R. Garcia
49. Thomas M. Gentry
50. John Goldejohn
51. Robert M. Goerlitz
52. David Gonzales
53. Raul Gonzales
54. Miguel A. Gonzales
55. Billy Gray
56. William L. Gray
57. Lawrence P. Gries
58. Thomas P. Gurrey
59. Preston R. Halfin
60. Sammy Head
61. Neal Hines
62. Larry A. Howell
63. Marshall P. Isom
64. James A. Johnson
65. Derry L. Jones
66. David E. Kaup
67. William C. Kinisell
68. Howard J. Kimile
69. Steve Kirls
70. Edgar Knighton
71. Freddy G. Lafurente
72. Michael G. Lagrove
73. Al Lanford
74. Vernon S. Lemons
75. Shemei B. Levi
76. Jeanne Long
77. Timothy Loyd
78. Joe S. Magallou
79. David B. Martin
80. Pedro Martinez
81. Russell L. Mayfield
82. Terry McGregor
83. Robert C. Meaux
84. Stephen Melinder
85. Marty M. Mirgo
86. D.D. Montgomery
87. Jose L. Merin
88. Richard O. Newby
89. Arthur W. Nolley
90. William R. Norwood
91. Richard C. Nummery
92. Karen D. O'Bannon
93. Raymond E. O'Bannon
94. Guadalupe Palafox
95. Wayne Parinella
96. Deborah Petruska
97. James A. Phillips
98. Simon C. Ramirez
99. Michael B. Rankin
100. James C. Reynolds
101. Willard G. Rogers
102. Gerald M. Robinson
103. Joe Ruffino
104. Lance J. Scott
105. Rob A. Self
106. Donald Shaver
107. James K. Shirley
108. James Smedick
109. Ginn K. Spriggs
110. Grahmann
111. Jeffrey M. Stauber
112. Larry L. Strickland
113. Billy J. Taylor
114. Kerry Townsend
115. Richard S. Trinski
116. Gordon Trott

117. Ed Trott
118. Richard P. Valdez
119. Dalton E. Van Slyke
120. Frank L. Vernagallo
121. Ruben Villarreal
122. Johnny F. Walling
123. Gerald R. Warren
124. James M. Watson
125. Thomas G. Welch
126. John A. Wheler
127. Joseph L. Williams
128. Rwanda Wiltz

The Respondents are Harris County, Texas and Tommy B. Thomas, Sheriff, Harris County, Texas[3]

3. Johnny Klevanhagen, former Sheriff of Harris County, was not a party to the appeal from the judgment of the Trial Court.

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APPENDIX

Appendix

Edward Christensen and 128 other individually named Harris County deputy sheriffs, Plaintiffs in the District Court and the Appellees in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Lynwood Moreau, et al. v. Harris County, Texas, et al.*, Fifth Circuit No. 97-20796 (October 19, 1998).

OPINIONS BELOW

The Court of Appeals opinion is reported at 158 F.3d 241 (5th Cir. 1998) and is reproduced as Appendix A (Pet. App. 1a-23a) in the separately bound Appendix to this *certiorari* petition (hereafter "Pet. App.").

The District Court's opinion on Summary Judgment was issued on November 25, 1996, reported at 945 F. Supp. 1067 (S.D. Tex. 1996), and is reproduced as Appendix B. (Pet. App. 24a-27a). The District Court's final order is unreported and is reproduced as Appendix C. (Pet. App. 28a).

JURISDICTIONAL STATEMENT

The Court of Appeal's Opinion and Judgment were entered on October 19, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petition for rehearing or hearing *en banc* was filed.

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of the 1985 Amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (FLSA), codified in 29 U.S.C. § 207(o) and the relevant implementing regulations thereto, codified in 29 C.F.R. §§ 553.20-553.28.

The 1985 Amendment to Section 7 of the FLSA is reproduced in Appendix E. (Pet. App. 32a-38a). The implementing regulations to the FLSA, promulgated by the Secretary of Labor are reproduced in Appendix F. (Pet. App. 39a-59a).

STATEMENT OF THE CASE

This case presents the question of whether public sector compensatory time under the 1985 Amendments to the Fair Labor Standards Act, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20-553.28, and the Secretary of Labor's considered interpretations and rulings thereon, a local governmental entity which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employees permitting mandatory time off, compel employees to utilize or burn their accumulated compensatory time bank involuntarily, that is, when they do not request it?

The Fifth Circuit has answered this question in the affirmative, expressly disagreeing with the Eighth Circuit holding in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schrirou v. Heaton*, 515 U.S. 1104 (1995) to the contrary. The court below consciously and intentionally created a conflict among the circuits.

> This case squarely presents the *Heaton* issue, and we must thus decide whether to extend [the Fifth Circuit's own previous FLSA compensatory time case] *Alford v. State of Louisiana*, 145 F.3d 280 (5th Cir. 1998) or to follow *Heaton*. We choose to extend *Alford*. The lack of uniformity occasioned by our decision to deviate from the Eighth Circuit is not a substantial concern in this context. (Pet. App. 10a-12a.)

The conflict also reflected an internal disagreement within the Fifth Circuit. Judge Dennis dissented on the basis of this Court's rule that

> because the statute is silent or ambiguous with respect to a specific issue, the question for this court is whether the administrative agency has addressed the issue, and, if so, whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), *see also, Auer v. Robbins*, 117 S. Ct. 905, 909 (1997).

(Pet. App. 14a-15a).

The tripartite dispute concerns whether the issue in this case should be decided on the basis of —

> (1) the Eighth Circuit's *Heaton* statutory construction rule — "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode," *Heaton*, 43 F.3d at 1180 — that compensatory time paid in lieu of, and as a restricted substitute for, the standard statutory requirement of cash overtime is a bank-like account which belongs to the employee under statutory limits controlling its **preservation and use** which prevent an employer from unilaterally compelling the use of compensatory time off contrary to the employees' preference; or
>
> (2) the majority Fifth Circuit's statutory construction "default rule" in this case —
>
> > our holding here and in *Alford* is thus merely an application of the general

> principal that the employer can set work place rules in absence of a negotiated agreement to the contrary.

(Pet. App. 13a); or

(3) dissenting Judge Dennis' articulation of this Court's rule in *Auer v. Robbins*, 519 U.S. 452 (1997) — it is the Secretary of Labor, and not the courts, that is charged with the issuance of regulations under the 1985 Amendment Act, P.L. 99-150, 56 (1985), and because the rules controlling FLSA compensatory time are

> a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling, unless plainly erroneous or inconsistent with the regulations. *Auer*, 519 U.S. at 456.

(Pet. App. 14a-23a).

THE PROCEDURAL HISTORY OF THIS CASE

On April 28, 1994, Petitioners ("Deputies"), consisting of 129 Deputy Sheriffs employed by Respondents ("County"), initiated this action in the United States District Court for the Southern District of Texas.[4] In their action, the Deputies contended that the County engaged in two practices which contravened the provisions of Section 7(o) of the FLSA and the Secretary of Labor's implementing regulations to that statute. In particular, the County failed and refused to grant the

4. Deputy Moreau was the initial lead plaintiff but is not a petitioner.

Deputies the use of their accumulated compensatory time when they reasonably requested and unilaterally forced them to use their accumulated compensatory time off when they did not request its use.

The Trial Court, after examining the Deputies claims required the parties to submit a stipulated set of facts addressing the County's practice of compelling Deputies to use their accumulated compensatory time. (Pet. App. 29a-31a). Correspondingly the Trial Court directed the parties to file cross motions for summary judgment based upon their stipulation of facts.

In response to the Trial Court's directive, the parties stipulated to the following facts:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who, for purposes of the Fair Labor Standards Act are considered non-exempt will be maintained below predetermined maximum levels. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that the employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested

to voluntarily take steps to reduce the accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce the accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employer and supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision with the department on an informal basis. (Pet. App. 29a-31a).

Based upon these stipulations, the parties filed their cross motions for summary judgment. On November 25, 1996, the Trial Court, addressing these motions, entered an opinion on summary judgment, holding that the County's practice of forcing employees to use their accumulated compensatory time when they did not request it violated the provisions of Section 7(o) of the FLSA, 29 U.S.C. § 207(o). *Moreau v. Harris County*, 945 F. Supp. 1067 (S.D. Tex. 1996). (Pet. App. 24a-27a). Relying on the decision of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995), the Trial Court found:

> Public employers may pay their employees for overtime by awarding time off at the rate of one and one-half hours for each hour, 29 U.S.C. § 207(o)(1992). Governments are allowed to substitute time off for cash as compensation; but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker's terms. *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995).
>
> Federal law limits maximum accrued time to 240 or 480 hours depending on the type of work an employee does. Employees must be paid cash for additional hours. The workers in this case have not yet accrued 240 hours. The function of the county limits is to force workers to take time off rather than to keep working and receive cash for overtime.

945 F. Supp. 1067. (Pet. App. 25a).

On July 28, 1997, the Trial Court entered a final judgment prescribing the County's practice of unilaterally forcing petitioners to consume their accumulated compensatory time. (Pet. App. 28a).

The County appealed this judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed. *Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998). (Pet. App. 1a-23a). The Fifth Circuit's Judgment was entered on October 19, 1998.

The Deputies, complaining of this decision and judgment, respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that Court's holding and resolve the issues surrounding the preservation of FLSA compensatory time consistently with the applicable rules and interpretations of the Department of

Labor. The question is one which is the subject of a clear, direct and severe conflict between the circuits undermining national uniformity with regard to enforcement of the FLSA overtime requirements, as well as one in which, the decision of the Fifth Circuit decided a federal question inconsistently with the applicable federal statute and related regulations and contrary to this Court's rule in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), that questions concerning a court's application of the Fair Labor Standards Act are controlled by the considered judgment of the Secretary of Labor concerning the application of her own regulations.

REASONS FOR GRANTING THE WRIT

This case presents a question of federal law on which the Circuit Courts of Appeal are diametrically divided — Does 1985's public sector exception from the FLSA's requirement that overtime be paid in cash rather than compensatory time off, generate compensatory time banks from which an employer may unilaterally withdraw time by scheduling mandatory time off, as the Eighth Circuit ruled below in this case? Or, do the compensatory time banks, developed as a substitute for an employee's entitlement to cash overtime, belong to the employee in the sense that they may be accessed only at the employee's request and may not be diminished unilaterally by the employer through the use of mandatory time off, as the Eighth Circuit has ruled in *Heaton*?

The application of FLSA § 207(o) contained in the majority decision of the Fifth Circuit below is an erroneous application of federal law in that it violates this Court's rule as set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), that a court's interpretation of the compensatory time off provision of § 207(o) is controlled by that of the Secretary of Labor. The decision of the Fifth Circuit is at odds with the Secretary's view.

I.

LEGISLATIVE AND REGULATORY BACKGROUND OF FLSA § 207(o) HIGHLIGHTS THE IMPORTANCE OF GRANTING THIS PETITION.

For forty-eight years compensatory time in lieu of cash payment for labor was anathema to the FLSA. For more than fifty years, timely cash payment for hours of work has been a fundamental premise of the Act. This is so because broadly used, liberally accessed, employer mandated compensatory time off in lieu of cash undermines the effectiveness of the national FLSA overtime standard.[5] The core purpose of the Act's premium pay for overtime is not the provision of an employee benefit; instead it is intended as a market disincentive to an employer so managing the work place to create fewer jobs with hours in excess of the forty hour per week standard rather than more jobs with hours within the standard.[6] Compensation

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5. 29 U.S.C. § 207(k) allows a work period in law enforcement of up to 171 hours in 28 days. That alternative schedule is applicable for Harris County Deputies. However, the traditional 40 hour per week standard remains the preferred as best short hand for referring to the national hours of work standard under the FLSA.

6. The job creation goal of the Act was highlighted by Justice Reed's 1941 opinion in *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941):

> [The Court of Appeals] felt that one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours. We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and one half provision, but another and

(Cont'd)

systems which provide for payment for hours of work other than in cash avoid this disincentive and undermine the effectiveness of the national hours of work standard.[7] This is particularly so when an employer establishes a practice of moving compensation liability from one pay period to another through mandatory time off as a substitute for cash overtime.

(Cont'd)

> an intended effect was to require extra pay for overtime work by those covered by the act even though the hourly wages exceeded the statutory minimum. The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan from the beginning. . . . The message of November 15, 1937 calling for the enactment of this type of legislation referred again to protection from excessive hours. May 24, 1937, 81 Cong. Rec. 4983, 75th Cong. 1st Sess. Sen. Rep. No. 884 on S. 24754 (July 6, 1937), all spoke of maximum hours as a separate desirable object. Indeed the Act itself in setting up two sections of standards, § 7 for hours, emphasizes the duality of the Congressional purpose. 316 U.S. at 577-578. (emphasis added).

7. " 'A ceiling for hours' is just as much an independent objective of the Act as a 'floor for wages,' and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high." "Stein Report" (October 10, 1940), *Wage and Hour Manual* (BNA), Cumulative Edition 1944-1945, at 679-680.

A mandatory time off system strikes the FLSA overtime standard a "double whammy" — the employer adjusts work schedules to get the job done with fewer workers; strike one. And then, the employer avoids contemporaneous premium pay cash liability; thus, strike two, defeating the cost of the time and one half incentive to spread the work among less expensive straight time workers.

In constructing the FLSA between 1936 and 1938, Senator Hugo Black, later Justice Black, and his New Deal colleagues, were insistent that pay be required in cash on the basis of a forty hour work week standard. The standard arose, in part, as a reform of the employment practices common in Senator Black's Alabama in the 1920's and 1930's, a period of job scarcity during which some of the Senator's constituents were often paid in script redeemable only at the employer's stores, rather than in cash, and were required to work very long work hours on days in which the company had extra work and go home on days in which work was slow. This employment system operated absent a national hours of work standard. It allowed industry to concentrate its work at low wages spread among fewer workers than would be the case under a standard forty hour work week with overtime at time and one-half.[8] The aim

8. *See*, the history of enactment of the FLSA in Roediger and Foner, *Our Own Time: A History of American Labor and the Working Day* (Greenwood Press, 1989); Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988); Rosensweig, *Eight Hours for What We Will: Workers and Leisure in an Industrial City 1870-1920* (Cambridge University Press, 1983); Steinberg, *Wages and Hours: Labor Reform in the Twentieth Century* (Rutgers University Press, 1982); Cahill, *Shorter Hours: A Study Since the Civil War* (Columbia University Press, 1932); Nodland, "A Brief History of the FLSA," 39 *Labor Law Journal* 715-28 (November 1988); Hunnicutt, "Monsignor Ryan and the Shorter Hours of Labor," 69 *Catholic Historical Review* 384-401 (July 1983); and Eggert, "Fight for the Eight Hour Day," *American History Illustrated*, 36-44 (May 1972).

of the FLSA premium pay/hours of work standard was to create a market incentive to spread work. The use of employer mandated time off as overtime compensation in lieu of cash alleviates the market force of that incentive and, thereby, lessens its effectiveness. Thus, the Act outlawed mandatory time off as a substitute for cash pay at a time and one half premium for overtime.

As originally enacted in 1938, the FLSA applied only to private employers. Beginning in 1966, Congress expanded the coverage to protect state and local government employees which resulted in a now settled question of the authority of the Congress to do so. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). That dispute was resolved in 1985 by *Garcia* with a recognition that under the federalism of the Tenth Amendment, Congress, and not the judiciary, is the proper institution to protect and give full consideration to federalism and the special attributes of state and local government, including particularly the special character of the public employer-public employee relationship.

In a direct response to these concerns, Congress amended the FLSA insofar as that Act applies to the public sector shortly after this Court's decision in *Garcia*. (P.L. 99-150; 99 Stat. 790). Congress enacted the 1985 Amendments after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs with a national hours of work standard which would include the public sector.[9]

9. *See, Hearings on the Fair Labor Standards Act*, H. Hrg. 99-67, 99th Cong. 1st Sess. (Sept. 24, 1995); and S. Hrg. 99-359, 99th Cong. 1st Sess. (July 25, August 28, and Sept. 10, 1995).

After the *Garcia* decision, many public employers and their organizations sought Congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In hearings held by House and Senate committees, public employees argued that compliance with *Garcia* would not be excessively costly, that it was only fair for public employees to enjoy the same standards as virtually all private employees, and that with the expansion of public employment to a much larger portion of the work force national wage and hours standards would be diluted were such a significant portion of American workers exempted.[10]

At the invitation of Congressional leaders, the public-employer and public-employee groups met and proposed legislation which was the product of intense negotiation between all the affected parties and a resulting extensive compromise.[11] With board support, including organizational

10. In the end, public employers and public employee representatives agreed in their testimony before Congress that use of compensatory time in lieu of overtime pay, if pursuant to equitable arrangements, could be mutually beneficial. *See*, e.g., House Hearings, 99th Cong., 1st Sess. 155 (1985) (G. Brazgel, IUPA Reg. Dir., representing the union of Deputies in their case) ("Comp time is vital to policing. Not only is it an important benefit to on the job police officers, but it also is an important tool of sound police management.")

11. *See, e.g.*, 131 Cong. Rec. S 14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the effective parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 Amendments). The compromise bill was supported by the National Association of Counties [of which Harris County is a member], the National Public Employer Labor Relations Association [in which Harris County participated], the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, the International Union of Police Association [of which the Deputies are members], the AFL-CIO [in which the Deputies are members], and other major public employer associations and public employees unions and associations.

support representing both the deputies and the County in this litigation, the 1985 FLSA Amendments were quickly and unanimously enacted by Congress. (App. G, H, and I, Pet. App. 60a *et seq.*).

Among the provisions in the resulting statute was FLSA Section 207(o) which accommodates the preexisting practice among state and local employers and the need and expressed preference for work place flexibility among their employees. The new public sector compensatory rule provided that, pursuant to strict conditions, a public employer may pay FLSA premium compensation for overtime in compensatory time off in lieu of cash. The provision is an exception to the general requirement that all overtime must be paid in cash. Compensatory time under the Act may be used only by qualifying public employees and only under strict conditions designed to prevent employer manipulation of the employee's right to time and one half remuneration for overtime. A public employer is permitted to deviate from the basic rule that employers are required to pay their employees in cash for all overtime work only pursuant to a compensatory time system which meets the standards of Section 207(o). As an exception to the more general prohibition on the use of compensatory time off as compensation, Section 207(o) was designed to be narrowly construed under strictly enforced conditions. *See, Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941); *Phillips v. Wallace*, 324 U.S. 490, 493 (1945); *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1947). In addition as the Eighth Circuit wrote in *Eaton*, the maxim of statutory construction *inclusio unius est exclusio alteris* is particularly appropriate when the statutory language being interpreted is an exception to a general rule. "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871).

Congress mandated the issuance of regulations necessary to implement the 1985 amendments after an open regulatory comment period. P.L. 99-150, § 6 (1985).[12] The Department of Labor, in turn, conducted an extensive rule making and solicited and carefully considered the views of state and local governments and of public employees. *See*, 52 Fed. Reg. 2012-15 (1987). Again public employers and employee representatives, including organizational representatives of Harris County and the Deputies in this case, contributed. *See*, 51 Fed. Reg. 25710 (July 16, 1986) and 52 Fed. Reg. 2012 (January 16, 1987). (*See*, App. J.) The Department of Labor's final regulations and discussion of the major comments received during the related comment period were published in January 1987. The final rule clarified the nature of accrued FLSA public sector compensatory time as a "bank" which is "preserved and used," and of which a record is kept. The DOL's response to comments emphasized employee flexibility; an accrued account to be administered with an element of employee choice and with the voluntary, knowing and willing agreement of the employee, absent any element of employer coercion. The employee's compensatory bank may not be used to avoid the cost of overtime at premium rates and its use may not be controlled by the scheduling convenience or inconvenience of the employer.[13] *See*, App. J, Pet. App. 79a *et seq.*

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12. When in 1974, Congress enacted the FLSA amendments which initially extended its coverage to state and municipal employees, Congress expressly indicated an intent that the Act would be administered after 1974 "in such a manner as to insure consistency with the meaning, scope, and applications established by rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H. Rep. 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811.

13. The regulatory comments spoke directly to the question presented here—

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(Cont'd)

1. The National League of Cities [the "NLOC"] recommended that a DOL reference to an "element of flexibility" for the employer and an "element of choice" for employees in 29 C.F.R. § 553.20 should be eliminated. The DOL kept the reference, pointing out that —

> [t]he legislative history indicates that the intent of section 7(o) was "to provide flexibility" to state and local government employers and an "element of choice" to their employees regarding compensation for statutory overtime by covered employees. (*Citing*, H. Rep. at 19).

2. The DOL accepted suggestions that it make 29 C.F.R. § 552.23 clear that provisions contained in compensatory time agreements which conflict with Section 7(o) are not valid.

3. The Public Employee Department, AFL-CIO, and other public employee representatives, expressed concern that the regulations leave no doubt that the element of choice in employees' use of compensatory time would not allow a unilateral employer imposed system. The DOL pointed out that the House Report states at page 20 that, "The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and the employee, or notice to the employee, prior to the performance of the work." The DOL emphasized that if the notice option is used employees must accept compensatory time "freely and without coercion" and maintained that language in 29 C.F.R. § 553.23(c).

4. The NLOC suggested that the "element of choice" allowed employees in some situations might be so small as to be limited to the freedom not to accept the position and find other employment. The DOL rejected this stating that both the Senate and the House provide that the agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may be made a condition of employment but "**only so long as** (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the comp time received may be **preserved**, used, or cashed out consistent with the provisions of the new subsection." (*Citing*, S. Rep. 11 and H. Rep. 20 (emphasis supplied)).

(Cont'd)

(Cont'd)

5. The NLOC suggested that the requirement that the employee "knowingly and voluntarily" agree to compensatory time agreements as a condition of employment be deleted. The DOL refused, stating that both the House and Senate legislative histories support the requirement. (*Citing*, H. Rep. at 20; S. Rep. at 11).

6. Commenters suggested revisions in 29 C.F.R. § 553.25's rules on the preservation and use of comp time. The AFL-CIO asked that it be made clear that the intent of the Act was to give employees the right to receive compensatory time and not the employer "the right to grant it." The DOL responded that —

> [t]he legislative history does indicate that an employee should not be coerced to accept more compensatory time in lieu of overtime pay than an employer can realistically and in good faith expect to be able to grant the employee within a reasonable time of his or her making a request to use such time. The rule has been modified to make clear that compensatory time is not envisioned as a means to avoid overtime compensation, (H. Rep. at 23), and that an employee has a right to be able to use the compensatory time earned.

7. The NLOC disagreed with the statement in 29 C.F.R. § 553.25 that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time." The DOL insisted on keeping the rule. (*Citing* H. Rep. at 23, and S. Rep. at 12). The DOL also pointed out that the Congress has directed that for employees where problems of disruption of service to the public are persistent, compensatory time should not be the preferred method of compensating for overtime work.

8. The methodology developed by the DOL to estimate the cost of compliance with the compensatory time provisions make clear that accrued compensatory time should be viewed as a "bank" or "saving" of compensatory time for later use to the call of the employee and not as a reserve of time which an employer might use as a reserve for mandatory time off during down time. (51 Fed. Reg. 25710 (July 16, 1996) and 52 Fed. Reg. 2012 (January 16, 1987).

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The 1985 Amendments and their regulations dramatically changed, for public agencies and no one else, the rules regarding compensatory time off. It created an exception to the Act's general prohibition of compensatory time in lieu of cash so long as the compensatory time system is in the public sector and so long as it is provided under a collective bargaining agreement, employment agreement, or a memorandum of understanding. (29 U.S.C. § 207(o), App. E, Pet. App. 32a-38a). The agreement can be made in one of three ways: (1) through negotiation with a recognized collective bargaining agent, where one exists; (2) through negotiation with the employees' representatives, where one has been designated in a jurisdiction which allows such designation; or (3) where there is no collective bargaining agent or employee representative through negotiation with individual employees. (29 U.S.C. § 207(o)(2); 29 C.F.R. § 553.23). Any such agreement must meet the following conditions set forth in House Report 99-331, 99th Cong. 1st Sess. 10 (1985) —

> The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with

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(Cont'd)

Finally, 9. DOL's record keeping rules with regard to compensatory time in 29 C.F.R. § 553.50, are consistent with the view of accrued comp time as a bank owned by the employee and require that the agreement or understanding allowing and controlling its preservation and use of compensatory time must either be a written document or must be preserved in a record of its existence. 29 C.F.R. § 553.50(d).

See, App. J, Pet. App. at 79a *et seq*.

> the provision of this new subsection [§ 207(o)]. The agreement or understanding may include other provisions governing the preservation, use or cashing out of compensatory time so long as those provisions are consistent with this subsection of the Act. (bracketed material supplied.)

Where the employees do not have a representative, whether they have not designated one or whether under the law of the jurisdiction the state and local government will not treat with one, the agreement with the employee must be arrived at before the work is done. (29 C.F.R. § 553.23(a)).

A Section 207(o) compensatory time agreement may be a condition of employment, however, even where a condition of employment is involved the employee's decision to accept compensatory time must be made "freely and without coercion or pressure." (29 C.F.R. § 553.23(c); and *Moreau v. Klevenhagen*, 508 U.S. 22 (1993)).

FLSA compensatory time must be paid, like cash overtime, at premium rates of time and one half, that is 90 minutes for each 60 minutes worked. (29 U.S.C. § 207(o)(1); 29 C.F.R. §§ 533.20 and 553.22). Employees such as the Deputies in this case may accumulate up to 480 hours of compensatory time. (29 U.S.C. § 207(o)(3); and 29 C.F.R. § 553.25). Requests by an employee to use accrued compensatory time must be granted if made within a reasonable time and if granting the request does not "unduly disrupt" the operations of the agency. (29 U.S.C. § 207(o)(5) and 29 C.F.R. § 553.25). Undue disruption of operations, and not budgetary considerations, is the **only** allowable reason for denying compensatory time. Undue disruption is more than inconvenience to the employer and the fact that an employer must pay a substitute overtime at premium rates is not a legitimate reason for denying access. (DOL Letter Ruling, August 19, 1994).

An employer may freely substitute cash payment, in whole or in part, for compensatory time off. (29 C.F.R. § 553.26). However, the regulations are clear that compensatory time is not to be used as a means of avoiding overtime compensation, and that, therefore, more compensatory time may not be used than an employer can realistically, and in good faith, expect to be able to grant to the employees' request. (29 C.F.R. § 553.25(b)). Public employers may, of course, choose not to enter non-coercive bilateral compensatory time agreements with their employees. However, if they choose that option, the default rule is that they must pay their employees in cash for overtime or add employees to eliminate the need for overtime.

Since the enactment of the 1985 Amendments and the promulgation of its implementing regulations, this Court has issued two major decisions concerning the application of the Act to public employees. In *Moreau v. Klevenhagen*, 508 U.S. 22 (1989), a dispute like this one involving Harris County sheriff's deputies, the Court ruled that, in a jurisdiction like Texas in which state or local law does not provide for collective bargaining, under Section 207(o)(2)(A)(ii) an "agreement between the employer and the employee" is one of the necessary prerequisites to an employer's access to a compensatory time compensation system. *Auer v. Robbins*, 519 U.S. 452 (1997) is the central precedent relied on by Judge Dennis in his dissent in this case, in which he would have ruled that the dispute here should have been remanded to the district court to be resolved in light of *Auer*'s direction that such disputes are controlled by the Secretary of Labor's interpretation of the applicable regulations.

Coming to the Court with his background, this case now presents a battle of alternative interpretations of the rules applicable to the use of compensatory time in lieu of cash overtime by a public employer.

Is the Fifth Circuit majority opinion below correct in the application of its "default rule" to the question, that is, do Section 207(o) and its regulations provide that, in a jurisdiction without collective bargaining, an employer may withdraw banked compensatory time from an employee by mandatory time off over the employee's objection on the rule of construction that where there is no express statutory language to the contrary, the employer has complete discretion to manage hours of work and compensation of common law employees?

Or, is the Eighth Circuit in *Heaton* correct in its ruling that Section 207(o) requires that compensatory time once earned belongs to the employee and may not be withdrawn except at the employee's direction?

Or, is dissenting Judge Dennis case correct that under the Act, its implementing regulations, and the *Auer* rule, the employer must preserve an employee's compensatory time bank absent use of the compensatory time at the employee's request unless an express mutually arrived at agreement between the employee and the employer allows the employer to "burn off" the employee's compensatory time through mandatory time off?[14]

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14. Judge Dennis' dissent concluded —

> Applying the provisions of the statute and the regulations to the present case, it is apparent that neither the plaintiffs nor the defendants have demonstrated that they are entitled to judgment as a matter of law under the FLSA as interpreted by the Secretary. Moreover, we should take notice that agreements between the County and each individual employee incorporating the County's regulations providing for compensatory time in lieu of monetary overtime compensation apparently actually exist. *See, Moreau v. Klevenhagen*, 508 U.S. 22, 29 (1993). The record before

(Cont'd)

II.

THERE IS A SEVERE CONFLICT BETWEEN THE CIRCUITS AS TO THE APPLICATION OF SECTION 207(o) OF THE FLSA.

It would be difficult to imagine a clearer conflict among the circuits than the conflict on this issue between the view of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir, 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1985), and the views expressed by the Fifth Circuit in *Alford v. State of Louisiana*, 145 F.3d 280, 285 (5th Cir. 1998) and this case, *Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998). The decision below expressly states: "This case squarely presents the *Heaton* issue, and we must thus decide whether to extend *Alford* or follow *Heaton*. We choose to extend *Alford*. The reasoning in *Heaton* is flawed." 158 F.3d at 245. It could not be more apparent or troubling that public employees' rights within the Eighth Circuit jurisdiction, and those courts choosing

(Cont'd)

> us, however, is not sufficiently complete to afford an adequate basis for determining whether provision granting the preservation, use and cashing out of compensatory time are included in these agreements, by incorporation or otherwise; or if so, whether these other provisions are consistent with or in violation of section 7(o) of the Act. If no controlling agreement exists, the district court should consider retaining jurisdiction while permitting the parties to enter such agreement. A court of appeals may vacate, set aside, or reverse the district court's judgment and remand the case and require further proceedings to be had as may be just under the circumstances . . . Accordingly, under these authorities and the summary judgment rules, I would vacate the district court's judgment and remand the case to it for further proceedings including a trial or the taking of additional evidence necessary to an informed decision on these questions. (Pet. App. at 20 (citations omitted)).

to follow *Heaton*, are radically different than those working in the Fifth Circuit, and those courts choosing to follow the *Moreau/Alford* view.

It defies logic that "Congress intended for the protections afforded by the [FLSA] to hinge upon the accident of the State in which the employee happens to reside." Chief Judge Ervin, dissenting in *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992).

III.

THE FIFTH CIRCUIT DECISION BELOW CONSTITUTES AN ERRONEOUS INTERPRETATION OF FEDERAL LAW.

The court below ruled that —

> . . . [T]his is a situation in which Congress has not spoken clearly in the text of the statute itself or in the legislative history. . . . In this case, the parties have not identified any controlling provision [in an compensatory time agreement under § 207(o)], and our obligation is to fashion a background rule, which the parties remain free to displace by future negotiations. . . . [W]e recognize that a default rule should not always be tailored to achieve the most efficient or most just result for the parties in the lawsuit. In many situations, an "untailored default," a "single, off-the-rack standard" that provides a satisfactory contractual solution in the run of cases may be preferred. Ian Ayers & Robert Gertner, "Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 *Yale L. J.* 87, 91 (1989).

> This is such a case. A holding that employees by default may bank their comp time would be as clear as the holding that we reach today. But a default rule should be selected at a higher level of abstraction, to ensure clear answers in other FLSA scenarios where neither Congress nor the parties in an agreement have resolved a particular issue. . . . In general, allowing an employer to establish uniform employment practices with respect to questions not previously negotiated seems preferable to a regime in which the courts determine which default rule is best to apply one policy at a time. (Pet. App. 12a).

This ruling is made: (1) without reference to the fact that the compensatory time provision in Section 207(o) was a legislative exception in which the "default" rule is one which provides for mandatory cash overtime; (2) without reference to the fact that the FLSA is a national hours of work standards law which is intended to create an incentive to having additional work done by additional employees through a time and one-half disincentive to cash overtime; (3) without reference to the fact that the central basis for national minimum wage and maximum hour standards is to avoid the traditional "default rule" in the work place which assumes that employers will always create work rules on the basis of their individual economic needs; and, most importantly; (4) without any effort to apply the applicable regulations or to discern the Secretary of Labor's interpretation of the provision within the FLSA authorizing compensatory time as a substitute for cash overtime.

Judge Dennis in his dissent emphasized the need for a remand to the district court for a decision applying the Secretary of Labor's interpretation of Section 207(o). The dissent and not the majority opinion is properly guided by this Court's rule in these matters. Where, as the court below found, "Congress

has not spoken clearly in the text of the statute or the legislative history," but where the Congress has clearly vested the Secretary of Labor with the authority to issue regulations under the statute and to apply, interpret, and enforce those regulations, the interpretation by the Secretary of Labor is the reference point which controls judicial application of the statute. *Auer v. Robbins*, 519 U.S. 452 (1997).

In failing to give controlling deference to the regulations and interpretation of the Secretary of Labor the Court below erred in its application of the FLSA.

CONCLUSION AND PRAYER

For the foregoing reasons, this petition for *certiorari* should be granted.

Respectfully submitted,

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15. Amber Bell, Esquire, 4012 Williamsburg Court, Fairfax, Virginia, participated in the preparation of this Petition for *Certiorari*.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED OCTOBER 19, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CA-94-1427
No. 97-20796

LYNWOOD MOREAU; KENNETH O. ADAMS; DAVID W. ADDISON, JOSE A. ALVARADO; ROBERT AMBOREE; BOBBY G. ANDREWS; RANDY ANDERWALD; GARY R. ASHFORD, CRAIG L. BAILEY; RICHARD BAILEY; RICHARDO E. BALDERAZ; HERBERT V. BARNARD; GERALD BARNETT; PAULETTE M. BARNETT; BRAD T. BENNETT; BRIDGETT BLACKMON; FLYNT E. BLACKWELL; GARY F. BLAHUTA; SCOTT P. BLANKENBURG; DEBORAH BLIESE; BRUCE H. BRECKENRIDGE; J.W. BROOKS; BRIAN BUCHANAN; PATRICIA M. BUI; DON E. BYNUM; CLARENCE A. CALLIS; WILLIAM M. CAMPBELL; HEATHER CARR; THOMAS J. CARR; PAUL E. CARPENTER; ROBERT CASEY; MARK E. CEPIEL; ELADIO C. CHAVEZ; EDWARD A. CHRISTENSEN; ROY CLARK; DENNY D. COKER; ALFORD A. COOK; GREGORY P. COX; DONALD D. CRAYTON; RICHARD D. CROOK; DAVID A. DAVIS; GARY W. DAVIS; CHRISTOPHER E. DEMPSEY; RUSSELL DUKES; LARRY A. EIKHOFF; FRANK FAIRLEY; DAVID W. FINELY; JAMES P. FITZGERALD; ERINE R. FOWLER; MICHAEL A. GARCIA; THOMAS M. GENTRY; JOHN GODEJOHANN; ROBERT M. GOERLITZ; DAVID GONZALES; RAUL V. GONZALES; MIGUEL A. GONZALEZ; BILLY GRAY; WILLIAM L. GRAY; LAWRENCE P. GRIES; THOMAS P. GURNEY; PRESTON

Appendix A

R. HALFIN; SAMMY HEAD; NEIL HINES; LARRY D. HOWELL; MARSHALL P. ISOM; JAMES A. JOHNSON; DERRY L. JONES; DAVID E. KAUP; WILLIAM C. KENISELL; HOWARD J. KIMBLE; STEVE KIRK; EDGAR D. KNIGHTEN; FREDDY G. LAFUENTE; MICHAEL G. LAGRONE; AL LANFORD; VERNON S. LEMONS; SHEMEI B. LEVI; JEANNE LONG; TIMOTHY LOYD; JOE S. MAGALLON; DAVID B. MARTIN; PEDRO MARTINEZ; RUSSELL L. MAYFIELD; TERRY MCGREGOR; ROBERT C. MEAUX; STEPHEN MELINDER; MARTY M. MINGO; D.D. MONTGOMERY; JOSE L. MORIN; RICHARD O. NEWBY; ARTHUR W. NOLLEY; WILLIAM R. NORWOOD; RICHARD C. NUNNERY; KAREN D. O'BANNION; RAYMOND E. O'BANNION; GUADALUPE PALAFOX; WAYNE PARINELLO; DEBORAH PETRUSKA; JAMES A. PHILLIPS; SIMON C. RAMIREZ; MICHAEL B. RANKIN; JAMES C. REYNOLDS; WILLARD G. ROGERS; GERALD M. ROBINSON; JOE RUFFINO; LANCE J. SCOTT; ROB R. SELF; DONALD SHAVER; JAMES K. SHIPLEY; JAMES SMEDICK; GINA K. SPRIGGS; (GRAHMANN); JEFFREY M. STAUBER; LARRY L. STRICKLAND; BILLY J. TAYLOR; KERRY TOWNSEND; RICHARD S. TRENSKI; GORDON TROTT; ED TROTTI; RICHARD D. VALDEZ; DALTON E. VAN SLYKE; FRANK L. VERNAGALLO; RUBEN VILLARREAL; JOHNNY F. WALLING; GERALD R. WARREN; JAMES M. WATSON; THOMAS G. WELCH; JOHN H. WHEELER; JOSEPH L. WILLIAMS; RWANDA WILTZ,

Plaintiffs-Appellees,

versus

Appendix A

HARRIS COUNTY; TOMMY B. THOMAS; JOHNNY KLEVENAGEN, Sheriff

Defendants,

HARRIS COUNTY; TOMMY B. THOMAS,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, PARKER and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Harris County appeals a grant of summary judgment in favor of a certified class of employees, finding that the County's policy requiring the use of accrued compensatory time by its employees contravened 29 U.S.C. § 207(o)(5) of the Fair Labor Standards Act (FLSA). We are persuaded that the 1985 Amendments to the FLSA do not grant public employees a right to choose when they will use accrued comp time. We reverse.

I.

The members of the class are employees of the Sheriff's Department of Harris County. The class asserted claims for wrongful refusal of compensatory time off, retaliation and involuntary use of compensatory time.

Appendix A

The parties have stipulated to the essential facts. By County policy the accrued comp time for non-exempt employees must be kept below a predetermined level, set by each bureau commander. This level is based on the personnel requirements of each bureau.

An employee reaching the maximum allowable hours of comp time authorized by the FLSA is requested to take steps to reduce the number of accrued hours. A supervisor is authorized to order the employee to reduce accumulated comp time at a time suitable to the bureau. An employee dissatisfied with his supervisor's order may informally complain to higher levels of supervisory authority within the department.

Based upon the stipulation of facts, the district court ordered the parties to move for summary judgment and to address whether the County policy requiring the involuntary use of comp time by its employees contravened 29 U.S.C. § 207(o)(5) of the FLSA.

On November 26, 1996, the district court issued an "Opinion on Summary Judgment" and an Interlocutory Declaratory Judgment that "Harris County may not force employees to use their accumulated comp time without violating the FLSA" and asked for briefing from both parties on attorneys' fees. Then, on July 28, 1997, the district court issued an order entitled "Final Judgment" which stated the following:

Final Judgment

1. Harris County may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act.

Appendix A

2. The parties plaintiff are awarded attorneys' fees of $21,360 from Harris County.

Plaintiffs did not ask the district court to rule on their claims for wrongful refusal of the use of comp time and for retaliation and it did not do so. This appeal followed.

II.

A.

First, there is our jurisdiction. The record on appeal indicates that the claims for wrongful refusal of the use of comp time and for retaliation have not been ruled on by the district court. Responding to our question, Harris County agreed with the class that we have jurisdiction since the district court intended its order to be a final judgment.[1]

We have jurisdiction only over final decisions of the district court, with limited exceptions that are not relevant here. 28 U.S.C. § 1291 (West 1993). A final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). We have advocated a practical approach in deciding issues of finality. A judgment reflecting an intent to dispose of all issues before the district court is final. *Vaughn v. Mobil Oil Exploration and Producing Southeast, Inc.*, 891 F.2d 1195, 1197 (5th Cir. 1990); *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*,

1. Plaintiffs did not address the jurisdictional issue in their briefs. However, at oral argument plaintiffs' counsel acknowledged that this court had jurisdiction over this appeal.

40 F.3d 698, 705 (5th Cir. 1994). If a party abandons one of its claims, a judgment that disposes of all remaining theories is final and appealable so long as it is apparent that the district judge intended the judgment to dispose of all claims. *Chiari v. City of League City*, 920 F.2d 311, 314 (5th Cir. 1991). When the district court hands down a judgment couched in language calculated to conclude all claims before it, that judgment is final. *Armstrong v. Trico Marine, Inc.*, 923 F.2d 55, 58 (5th Cir. 1991).

Here, the district court in entering final judgment appeared to decide all claims, although it did not explicitly address plaintiffs' wrongful refusal and retaliation claims. Nevertheless, plaintiffs did not pursue any error by the district court and acknowledged at oral argument that we have this jurisdiction over this appeal. We conclude that the district court decided all claims before it that were not abandoned. The order is a final judgment for purposes of this appeal.

B.

This dispute centers around Harris County's policy of not permitting accrued comp time for non-exempt employees to rise above a predetermined level by directing employees to reduce the number of hours of accrued comp time. The district court held that accumulated comp time and salary must be treated the same way and that employees have a right to use comp time when they choose. Granting summary judgment for the class, the district concluded that Harris County's policy of controlling the amount of accrued comp time violated the FLSA. More precisely put, we must decide whether Harris County violates 29 U.S.C. § 207(o)(5) of the FLSA when it involuntarily shortens an employee's workweek with pay.

The relevant FLSA statute states:

> (5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency —
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5) (West Supp. 1998).

Harris County contends that the 1985 Amendments to the Fair Labor Act of 1938, reflected above, were enacted to alleviate the economic burden upon state and local governments imposed by the Act's cash overtime requirements, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (holding, in a 5-4 decision, that the FLSA could constitutionally apply to states and their political subdivisions), as were the implementing Department of Labor regulations. The County urges that Congress must have intended for public employers to control the accrual of comp time because Congress contemplated a circumstance in which a public employer may elect to reduce or eliminate accrued comp time by making a cash payment. They point to 29 U.S.C. §207(o)(3)(B) which states that "if compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the

regular rate earned by the employee at the time the employee receives such payment." Since this statute permits a public employer to reduce accrued comp time with cash payments, Harris County asserts that reductions in comp time must be at the employer's option.

The class contends that Congress vested the employee, rather than the employer, with the right to determine the use of accrued comp time off. They urge that 29 U.S.C. § 207(o)(5) imposes only one limitation on this right — that the use of the comp time not unduly disrupt the operations of the public agency. The plaintiffs maintain since no other limitation on this right was imposed by Congress, they could choose to use or to bank their comp time as they see fit. In their view, employers do not have the right to control employees' use of their accrued comp time, so long as their use does not unduly disrupt their operations.

The economic incentives at stake are clear. In an era of tight public budgets, state employers like Harris County wish to control the accrual of comp time in order to avoid paying cash overtime wages when the amount of accrued comp time for any employee reaches the statutory maximum of 240 or 480 hours. The state employees, on the other hand, want to accumulate accrued comp time up to the statutory maximum in order to receive cash payments at an overtime rate of time and one-half or at least retain the ability to "bank" comp time for later use at their behest.

Section 207(o)(5) does not address the Harris County policy. This statute is triggered only when the employee first requests the use of her accrued compensatory time and does not address whether a public employer may control an

employee's accrual of comp time. *See Heaton v. Moore*, 43 F.3d 1176, 1181 (8th Cir. 1994). On its face then the statute is inapplicable to the present dispute. The class counters that the statute evidences Congress' belief that the use of accrued comp time must reside only with the employee and not the employer. The statute recognizing public employers' ability to pay down accrued comp time, 29 U.S.C. § 207(o)(3)(B), equally reflects Congressional intent to permit public employers to control the accrual of comp time.[2] Congress wanted to balance competing interests and intended for both public employers or employees to retain some control over accrued comp time.

Congress amended the FLSA in 1985 to ease the cost to state and local governments of complying with the FLSA, particularly its overtime payment provisions. During the debates, Congress considered proposals for an amendment exempting governmental agencies from the FLSA. Rather than completely excluding agencies from the reach of the FLSA, Congress balanced the burden of complying with the FLSA's overtime provisions with protection for the worker. *See* Todd D. Steenson, Note, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress' Lack of Clarity*, 75 Minn. L. Rev. 1807, 1812, 1828 (1991). The 1985 Amendments accomplished this dual purpose by allowing public employers to agree with employees to award comp time in lieu of monetary payments at a rate not lower than one and one-half hour for every overtime hour an employee works. *Id.* at 1812. Under this scheme, employees working overtime would receive additional time off

2. Along the same lines, 29 C.F.R. § 553.27(a) states that "[p]ayments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment."

from the job with pay but not cash at the higher overtime rates. In sum, Congress did not consider or resolve the question that we face here. Because the legislation reflected a compromise, it is impossible to determine how Congress would have legislated had it confronted the question. Before devising our own solution, we must of course look to precedent.

C.

Relying on the Eighth Circuit's opinion in *Heaton*, the class urges that since "banked compensatory time is the property of the employee," they have the right to "bank" comp time in "what amounts to an employee-owned savings account of compensatory time." *See Heaton*, 43 F.3d at 1180. We have recently held that the 1985 Amendments to the FLSA, and section 207(o) in particular, do not reflect Congressional intent to create a property right in accrued comp time for employees. *See Alford v. Louisiana*, __ F.3d __, draft op. at p. 12 (5th Cir. 1998). *Alford*, however, sought to distinguish *Heaton*. In *Alford*, the employees merely sought to require employees to use comp time before dipping into annual leave, while in *Heaton*, the employer sought to require use of comp time before the use of annual leave. This case squarely presents the *Heaton* issue, and we must thus decide whether to extend *Alford* or to follow *Heaton*.

We choose to extend *Alford*. The reasoning in *Heaton* is flawed. The *Heaton* court rested on the principle of construction that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Id.* at 1180 (internal quotation marks omitted). Because employees may choose to use their compensatory time within certain limits, the argument continues, employers cannot make the employees use the compensatory time sooner than the employees prefer.

This seems to be a misapplication of the relevant rule of construction. The question here is whether the statute "limits" the the "thing to be done," and thus application of the rule begs the question. Compare, for example, the Supreme Court case *Heaton* cites as originally invoking this rule of construction, *Raleigh & Gaston Ry. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871). In that case, a railroad company's charter provided that it should not be taxed for 15 years, and the Court held that by implication it could be taxed thereafter. That seems straightforward enough, but the same principle cannot mean that because an employee with comp time available can choose to use this comp time, an employer can never require an employee to reduce accumulated comp time. One simply does not relate to the other.

It is perhaps understandable that *Heaton*'s reasoning should be strained, because this is a situation in which Congress has not spoken clearly in the text of the statute itself or in the legislative history. Of course, we could still follow *Heaton* on prudential grounds, or simply to avoid an intercircuit conflict. This, however, would be a mistake, for it would leave the jurisprudence in this circuit unnecessarily confused. There seems no reason to allow our rule to turn on the issue of whether an employer conditions its requirement that an employee use comp time on the employee's attempt to take annual leave. We are bound by *Alford*, and if we were to follow *Heaton*, employers and employees through the Circuit would need to brace themselves for expensive litigation over what conditions an employer could place on an employee's annual leave.

The lack of uniformity occasioned by our decision to deviate from the Eighth Circuit is not a substantial concern in this context. Even in the absence of further congressional or

regulatory action, neither *Heaton*, nor *Alford*, nor our extension of it today represents the final word in any workplace. In the absence of a mandatory rule governing the situation, the parties remain free to reach a contractual solution to the problem. Provisions of an agreement between a covered employer and employees with regard to compensatory time are valid so long as they do not contradict the FLSA itself. *See* 29 C.F.R. § 553.23(a)(1). In this case, however, the parties have not identified any controlling provisions, and our obligation is to fashion a background rule, which the parties remain free to displace in future negotiations.

While *Alford* did not make explicit that its rule is only a default, it is worth noting that the default it selected was almost certainly the correct one. In fashioning a default rule, we are mindful of the academic consensus that the court's task is not simply to construct the rule that the parties would have bargained for if they had been fully informed and bargaining had been costless. *See generally Symposium on Default Rules and Contractual Consent*, 3 S. Cal. Interdisciplinary L.J. 1 (1993). Moreover, we recognize that a default rule should not always be tailored to achieve the most efficient or most just result for the parties to the lawsuit. In many situations, an "untailored default," a "single, off-the-rack standard" that provides a satisfactory contractual solution in the run of cases may be preferable. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91 (1989).

This is such a case. A holding that employees by default may bank their comp time would be as clear as the holding that we reach today. But a default rule should be selected at a higher level of abstraction, to ensure clear answers in other FLSA

scenarios where neither Congress nor the parties in an agreement have resolved a particular issue. *See, e.g.*, Ayres & Gertner, *supra*, at 96 (noting the importance of minimizing future litigation costs in establishing a default rule). In general, allowing an employer to establish uniform employment policies with respect to questions not previously negotiated seems preferable to allowing each employee to establish his or her own policy, and it is certainly preferable to a regime in which the courts determine which default rule is best to apply one policy at a time.

Our holding here and in *Alford* is thus merely an application of the general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary.[3] While this default may not achieve the optimal solution in every case, it promotes justice writ large. In establishing this approach, we expect to promote the interests of employers and employees alike by minimizing the need for future litigation concerning policies not addressed by Congress or employer-employee agreements. And, of course, this general interpretive approach is itself a default, and the parties may select a different rule governing the construal of their agreements if they choose.

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3. There may be situations in which an employer is required to negotiate before establishing a workplace rule. *See,e.g., National Labor Relations Bd. v. Katz*, 369 U.S. 736, 747 (1962). The employees here, however, have not alleged a violation of the National Labor Relations Act. This opinion's analysis is consistent with any limitations on unilateral action that may exist. While an employer in certain circumstances may not be able to set forth a uniform policy, the rule that employers may require employees to use comp time applies even if that rule has not been duly enacted as a workplace policy, in the absence of an agreement to the contrary.

III.

We REVERSE the district court's grant of summary judgment in favor of the class and enter judgment for Harris County and all other defendants.

REVERSED.

DENNIS, Circuit Judge, Concurring in part and dissenting in part.

In my opinion neither the plaintiffs nor the defendants have demonstrated that they are entitled to judgment as a matter of law on the present record. Accordingly, I agree that the district court's judgment must be reversed. I disagree, however, with the majority's decision to grant summary judgment for the county at the appellate level. The majority incorrectly applies its own common law type "default rule" rather than following the Secretary's authoritative interpretation of the FLSA. Consequently, the majority erroneously fails to remand the case to the district court for trial or other proceedings as is required by the correct legal principles.

The FLSA does not directly address the precise question at issue in this case, viz., whether a public agency may, absent an employee's request or agreement, unilaterally compel the employee to use accrued compensatory time off rather than receiving cash compensation for the accrued compensatory time off in accordance with § 207(o)(3)(B). Because the statute is silent or ambiguous with respect to the specific issue, the questions for this court are whether the administrative agency has addressed the issue, and, if so, whether the agency's answer is based on a permissible construction of the statute. *Chevron*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); *see also Auer v. Robbins*, 117 S.Ct. 905, 909 (1997)(quoting *Chevron*, 467 U.S. at 842-843). A court does not simply impose its own construction on the statute when an administrative interpretation based on a permissible construction of the statute exists. *Chevron, U.S.A., Inc.*, 467 U.S. at 843; *Fort Hood Barbers Assn. v. Herman*, 137 F.3d 302, 307 (5th Cir. 1998)(Summary Calendar).

The deference owed by this court to administrative regulations issued to interpret and implement a federal statute depends on whether the regulation is "legislative" or "interpretative." *Fort Hood Barbers Assn.*, 137 F.3d at 307; *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194, 197 (5th Cir. 1996); *Dresser Industries, Inc. v. Comm'r*, 911 F.2d 1128 (5th Cir. 1990)(internal citations omitted). If legislative, that is "issued under a specific grant of authority to prescribe a method of executing a statutory provision," the regulation is controlling unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Snap-Drape, Inc.*, 98 F.3d at 197-98 (internal citations omitted); *see also Chevron, U.S.A., Inc.*, 467 U.S. at 843. An "interpretative" regulation is one promulgated pursuant to a "general grant of authority to prescribe regulations." Interpretative regulations are accorded less deference, but are valid if they are "reasonable and 'harmonize[ ] with the plain language of the statute, its origin, and purpose.' " *Fort Hood Barbers Assn.*, 137 F.3d at 307 (quoting *Snap-Drape, Inc.*, 98 F.3d at 197).

The FLSA is administered and enforced by the Secretary of Labor. 29 U.S.C. §205; *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); *Condo v. Sysco Corp.*, 1 F.3d 599, 604 (7th Cir. 1993); 1 ROTHSTEIN, ET AL., EMPLOYMENT LAW § 4.10 pp.

368-69 (1994). The 1984 amendments to the FLSA expressly authorize the Secretary to promulgate regulations as are necessary to implement the amendments. 99 Stat. 787, §6, 29 U.S.C. § 203 (note). Pursuant to this authorization, the Secretary has promulgated regulations interpreting and applying pertinent provisions of the FLSA regarding compensatory time off. *See* 29 C.F.R. §553.2(b), §§553.20-553.28. I believe the Secretary's regulations by clear implication address the issue in the present case.

The regulations reiterate that in compensating employees for overtime work, a public agency may not substitute compensatory time off for overtime cash pay unless there was an agreement or understanding to do so between the employer and the employee (or the employee's representative) prior to the performance of the work. §553.23(a)(1). With respect to employees not covered by a bargaining or representative's agreement, but hired before April 15, 1986, the regular practice in effect on that date constitutes an agreement which satisfies the statute. *Id.* Further, a notice to an unrepresented individual employee that compensatory time will be awarded in lieu of overtime pay can evidence an agreement as required by the FLSA. §553.23(c)(1). Although an agreement as required by the statute is presumed to exist if such notice is given with respect to any employee who does not communicate his unwillingness to accept compensatory time rather than overtime pay to his employer, the employee's decision to accept compensatory time "must be made freely and without coercion or pressure." *Id.* Finally, the agreement may take the form of an express condition of employment, if the employee knowingly and voluntarily agrees to it as a condition of employment and is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of section 7(o) of the Act. *Id.*

The agreement may include provisions restricting compensatory time off to certain hours of work only. §553.23(a)(2). Provisions governing the preservation, use, or cashing out of compensatory time also may be included; however, to the extent that any provision of an agreement is in violation of section 7(o), it is superseded by the requirements of section 7(o). *Id.*

The employer may discharge its obligation to honor accrued compensatory time earned after April 14, 1986, at any time by paying for it the regular rate earned by the employee at the time the employee receives payment. §553.27(a). Upon termination of employment, the employer must pay the employee for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than the average regular rate received by such employee during the last 3 years of the employee's employment, or the final regular rate received by such employee, whichever is higher. §553.27(b).

Compensatory time cannot be used to avoid statutory overtime compensation. §553.25(b). "An employee has the right to use the compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable time of the employee's request for use of such time." *Id.*

If an employee has accrued compensatory time and requests use of this compensatory time, the employer must permit the use of such time off within a "reasonable period" after the employee's request as long as such use will not "unduly disrupt" the operations of the agency. §553.25(a). A "reasonable period" will be determined by considering the customary work practices

within the agency based on the circumstances, including the normal schedule of work, anticipated peak workloads based on past experience, emergency requirements for staff and services, and the availability of qualified substitute staff. §553.25(c)(1). If applicable provisions are included within the agreement or understanding between the employer and employee, they will govern the meaning of "reasonable period." §553.25(c)(2). An "unduly disruptive" use of accrued compensatory time off is one which the agency reasonably and in good faith anticipates "would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public." §553.25(d).

The Secretary's approach rejects the wooden proposition that the FLSA grants control over the use of accrued compensatory time either exclusively to the employee or to the employer independently for its own unilateral purposes. Rather, it requires an agreement and understanding between the employer and the employee prior to the performance of the work to initiate compensation with, and accrual of, compensatory time off. As part of this agreement, the Secretary's construction also permits the employer and the employee to include other provisions governing the preservation, use, or cashing out of compensatory time so long as they are consistent with section 7(o) of the FLSA. These regulations indicate that the Secretary did not interpret the FLSA to allow an employer to require an employee involuntarily to use accrued compensatory time off in the absence of a lawful agreement providing such authorization.

In deciding whether the Secretary's approach qualifies as a permissible construction of the FLSA, it is not necessary to decide whether the Secretary's regulations issued pursuant to

authority granted by the 1985 amendments are legislative or interpretative. Even if the regulations are properly classified as interpretative, they clearly are reasonable and in harmony with the language of the statute, its origin, and purpose. In enacting the 1985 amendments to the FLSA, Congress clearly sought to balance the needs and interests of both public employees and employers subject to the FLSA. The Secretary's approach accomplishes this Congressional directive by requiring employers desiring authorization to order employees to use accrued compensatory time whenever the employer deems such consumption appropriate to include applicable provisions, consistent with the statute, in their agreements made with the employee.

With respect to employee requests for use of accrued compensatory time, the regulations specifically authorize the employer and employee in their agreement or understanding to state terms and conditions governing the meaning of "reasonable period." In addition, the Secretary sets forth a non-exclusive list of underlying considerations for use in determining the "reasonable period" within which a compensatory time off request must be granted and whether doing so would be "unduly disruptive" in a particular case. These regulations lead naturally and logically to the inference that the factors for evaluating the reasonableness and legality of any consensual limitations upon the employee's right to use and preserve compensatory time earned should be similar to those suggested for determining or defining a "reasonable period" within which an employer must grant a compensatory time off request, a use of compensatory time off that is "unduly disruptive" to the employer's operations, and a "realistic" and "good faith" utilization of compensatory time off in lieu of overtime cash pay by an employer.

Applying the provisions of the statute and the regulations to the present case, it is apparent that neither the plaintiffs nor the defendants have demonstrated that they are entitled to judgment as a mater of law under the FLSA as interpreted by the Secretary. Moreover, we should take notice that agreements between the County and each individual employee incorporating the County's regulations providing for compensatory time in lieu of monetary overtime compensation apparently exist. *See Moreau v. Klevenhagen*, 508 U.S. 22, 29 (1993). The record before us, however, is not sufficiently complete to afford an adequate basis for determining whether provisions governing the preservation, use, or cashing out of compensatory time are included within these agreements, by incorporation or otherwise; or if so, whether these other provisions are consistent with or in violation of section 7(o) of the Act. If no controlling agreement exists, the district court should consider retaining jurisdiction while permitting the parties to enter such agreements. A court of appeal may vacate, set aside, or reverse a district court's judgment and may remand the cause and require such further proceedings to be had as may be just under the circumstances. 28 U.S.C. § 2106. *See Youngstown Sheet and Tube Co. v. Lucey Products Co.*, 403 F.2d 135, 139-41 (5th Cir. 1968) (Remanded to allow submission of proof to insure that substantial justice be done). *See also Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721 (1941) ("Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."). Accordingly, under these authorities and the summary judgment rules, I would vacate the district court's judgment and remand the case to it for further proceedings including a trial or the taking of additional evidence necessary to an informed decision of these questions.

Harris County argues that the FLSA authorizes public agencies to unilaterally force employees to reduce periodically

their accrued compensatory time by taking off regular work days to prevent employees from demanding monetary compensation for any overtime hours worked after the statutory maximums are reached or cashing in large amounts of compensatory time upon their retirement or termination. The FLSA does not expressly give public agencies this right. The County, however, contends that because it has the right under §207(o)(3)(B), at any time, to reduce or eliminate an employee's accrued compensatory time, by paying the employee for that time at the employee's current regular rate of pay, the statute clearly implies that it may also reduce it by requiring an employee to use accrued compensatory time involuntarily (i.e., by not working hours for which the employee is compensated at the employee's regular rate. §207(o)(7)). The majority embraces and rearticulates the County's argument as follows:

> The statute recognizing public employers' ability to pay down accrued comp time, 29 U.S.C. § 207(o)(3)(B), equally reflects Congressional intent to permit employers to control the accrual of comp time.

Maj.Op.p.8 (footnote omitted).

In addition to not being persuasive, this approach fails to give proper deference to the Secretary's interpretation of the statute. The provision relied upon, §207(o)(3)(B), provides: "If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment." Although an agency can reduce an employee's accrued compensatory time by paying for that time in cash, it does not necessarily follow that an employer can unilaterally

require an employee to reduce accrued compensatory time by taking time off at regular pay.

Recognizing the unique fiscal burden that compliance with the FLSA would present to public agencies, the 1985 amendments to the FLSA permit only public agencies to compensate employees for overtime with compensatory time instead of cash payments. Congress did not intend, however, to allow public agencies to indefinitely replace monetary overtime compensation with compensatory time, undoubtedly an inferior substitute for cash. The statute clearly requires that any employee who has accrued 480 or 240 hours, as the case may be according to the category of employment, of compensatory time be paid overtime compensation in cash for additional overtime hours of work. §207(o)(3)(A). If Congress had intended to allow employers to permanently avoid the obligation of providing monetary compensation for overtime hours, it would not have imposed these statutory maximums on the amount of compensatory time the employer may award. The provision allowing employers to reduce the amount of accrued compensatory hours by paying monetary compensation does not reflect an intent to allow employers to unilaterally force employees to consume accrued compensatory time without any concession to the employees' desires; instead, it simply provides employers with the option to decrease compensatory time balances by paying cash — the usual and superior form of overtime compensation.

Moreover, the FLSA expressly provides that an employee of a public agency who has accrued compensatory time off and has requested the use of such compensatory time shall be permitted by the agency to use such time within a reasonable period after making the request if the use of the compensatory

time does not unduly disrupt the operations of the agency. § 207(o)(5). Accordingly, even if an agency can on its own initiative redeem compensatory time commitments for cash (the preferred form of compensation) at the employee's current regular rate of pay, it simply does not follow that an agency can also unilaterally make the employee's compensatory time an even less desirable substitute for cash overtime pay by depriving the employee of the choice of when and how to use it, but instead dictating the manner of its usage without regard to the desires or convenience of the employee.

Construing the statute in accordance with the Secretary's regulations does not deprive employers of all control of employee compensatory time balances. Employers may enter into an agreement with employees (or their representatives) concerning the preservation, use, and cashing out of compensatory time provided that these such agreements are consistent with section 7(o) of the FLSA. In addition, the regulations specifically allow employers to reduce these balances by paying cash for the accrued compensatory hours. Finally, as the Eighth Circuit noted in *Heaton v. Moore*, 43 F.3d 1176, 1181 (8th Cir. 1994), employers can always schedule less overtime or hire additional workers to decrease the rate of accrual of compensatory time.

APPENDIX B — OPINION ON SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED AND FILED NOVEMBER 25, 1996

Lynwood MOREAU, et al, Plaintiffs,

v.

HARRIS COUNTY, et al., Defendants.

Civil Action No. H-94-1427.

United States District Court,
S.D. Texas

Nov. 25, 1996

* * *

OPINION ON SUMMARY JUDGMENT

HUGHES, District Judge.

1. Introduction.

Harris County employees sued it for forcing them to use their accumulated compensatory time at its convenience. County supervisors compelled employees to use their accrued time when their balances approached a set level. Accumulated time credits cannot be managed differently than salary; employees have a right to use it when they choose.

Appendix B

2. Accumulation.

The Harris County Sheriff's department has determined a maximum level for accumulated time credits. The level varies among competent sections within the department. The maximum hours that may be maintained is set by each bureau commander based on assessments of its personal requirements. When an employee's accumulated time approaches that level, the employee is asked to decrease it. If he does not comply promptly, the supervisor orders him to do it. Dissatisfied employees may complain informally within the department hierachy.

3. Fair Labor Standards Act.

Public employers may pay their employees for overtime by awarding time off at the rate of one and one-half hours for each hour. 29 U.S.C. § 207(o) (1992). Governments are allowed to substitute time off for cash as compensation, but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker's terms. Heaton v. Moore, 43 F.3d 1176 (8th Cir.1994), cert. denied, Schriro v. Heaton, __ U.S. __, 115 S.Ct. 2249, 132 L.Ed.2d 257 (1995).

Federal law limits maximum accrued time to 240 or 480 hours, depending on the type of work an employee does. Employees must be paid cash for additional hours. The workers in this case have not yet secured 240 hours. The function of the county limits is to force workers to take time off rather than to keep working and receive cash for later overtime.

4. Public Administration.

If the government finds it inconvenient to schedule around employees taking their compensatory time, it is always free to switch to cash compensation at the premium rate that other employers have to bear. If the government finds it inconvenient to pay workers who reach the statutory limit the cash premium required by federal law, it is always free to hire additional workers, lowering the hours worked by each. This spreading of economic opportunity was among the social policies that led to the wage and hour laws in the first place. See generally Learned Hand, Due Process of Law and the Eight-Hour Day, 21 HARV.L.REV. 495 (1908); Lonnie Golden, The Economics of Worktime Length, Adjustment, and Flexibility: a Synthesis of Contributions from the Competing Models of the Labor Market, REV.SOC.ECON., Mar. 1, 1996.

Limiting accumulated time might otherwise be a reasonable management technique, but federal law says a worker cannot be made to bear the burden of the government's allocation of its resources. The way for public employers to control the use of compensatory time is for them to control its being generated in the first place.

5. Extortionate Consumption.

A public employer may exercise control over an employee's use of compensatory time only when the employee's requested use of that time would disrupt the employer's operations. An employee could attempt to extort concessions from her employer by taking compensatory time at a time when her presence is critical to the operation, but no suggestion has been made that the sheriff's office has been the victim of abusive

workers. Frankly, it is difficult to imagine this argument being serious.

Although an employer may establish reasonable restrictions on vacations, sick leave, and other time-off forms of compensation, it cannot evade its statutory obligation for extra pay for overtime work, even when the statute allows the extra pay to be in the form of time off. Compensatory time is far less amenable to management adjustment than the others because the time off is in place of cash pay required by statute.

6. Conclusion.

Compensatory time, like overtime, causes management problems, including taxpayer reactions. The government and its managers must solve those problems without imposing on the statutorily-protected rights of the workers.

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED JULY 25, 1997 AND ENTERED JULY 28, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-94-1427

LYNWOOD MOREAU, *et al.*,

Plaintiffs,

versus

HARRIS COUNTY, TEXAS, *et al.*,

Defendants.

Final Judgment

1. Harris County may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act.

2. The parties plaintiff are awarded attorney's fees of $21,360 from Harris County.

Signed July 25, 1997, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX D — STIPULATION DATED AND ENTERED JULY 28, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1427

LYNWOOD MOREAU,

Plaintiff,

V.

HARRIS COUNTY,

Defendant.

STIPULATION

It is hereby stipulated by and between the parties that the following is a true and accurate description of the policy of the Harris County Sheriff's Department regarding compulsory use of accumulated compensatory time:

Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who for purposes of the Fair Labor Standards Act are considered non-exempt, will be maintained below a predetermined maximum level. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel

Appendix D

requirements of the particular bureau. Whenever it appears that an employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supe visor is authorized to order the employee to reduce his or her accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employee and the supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision within the Department on an informal basis.

Respectfully submitted,

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Appendix D

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APPENDIX E — FAIR LABOR STANDARDS ACT OF 1938, § 7(o)-(q), 29 U.S.C.A. § 207(o)-(q)

§ 207 Maximum Hours

* * *

(o) Compensatory time.

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only —

(A) pursuant to —

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable

to the employee prescribed by paragraph (3). In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

Appendix E

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than —

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher [.]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency —

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if —

(A) such employee is paid at a per-page rate which is not less than —

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(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection —

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which

an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution.

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency —

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

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(q) Maximum hour exemption for employees receiving remedial education.

> Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is —
>
> (1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;
>
> (2) designed to provide reading and other basic skills at an eighth grade level or below; and
>
> (3) does not include job specific training.

* * * *

APPENDIX F — REGULATIONS INVOLVED

29 C.F.R. § 553.20

SECTION 7(o) — COMPENSATORY TIME AND COMPENSATORY TIME OFF

§ 553.20 Introduction.

> Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

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29 C.F.R. § 553.21

§ 553.21 Statutory provisions.

Section 7(o) provides as follows:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only —

(A) Pursuant to —

(i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the

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employer and employee before the performance of the work; and

(B) If the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may

accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than —

(A) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) The final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of

a State, or an interstate governmental agency —

(A) Who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection —

(A) The term *overtime compensation* means the compensation required by subsection (a), and

(B) The terms *compensatory time* and *compensatory time off* means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

* * *

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29 C.F.R. § 553.22

§ 553.22 "FLSA compensatory time" and "FLSA compensatory time off".

(a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

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29 C.F.R. 553.23

§ 553.23 Agreement or understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus

one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime

compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be

given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agr ement or understanding with each employee em, ed prior to that date. If, however, such a regula actice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

* * *

29 C.F.R. § 553.24

§ 553.24 "Public safety", "emergency response", and "seasonal" activities.

(a) Section 7(o)(3)(A) of the FLSA provides that an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may accumulate not more than 480 hours of compensatory time for FLSA overtime hours which are worked after April 15, 1986, if the employee is engaged in "public safety", "emergency response", or "seasonal" activity. Employees whose work includes "seasonal", "emergency response", or "public safety" activities, as well as other work, will not be subject to both limits of accrual for compensatory time. If the employee's work regularly involves the activities included in the 480-hour limit, the employee will be covered by that limit. A public agency cannot utilize the higher cap by simple classification or designation of an employee. The work performed is controlling. Assignment of occasional duties within the scope of the higher cap will not entitle the employer to use the higher cap. Employees whose work does not regularly involve "seasonal", "emergency response", or "public safety" activities are subject to a 240-hour compensatory time accrual limit for FLSA overtime hours which are worked after April 15, 1986.

(b) Employees engaged in "public safety", "emergency response", or "seasonal" activities, who

transfer to positions subject to the 240-hour limit, may carry over to the new position any accrued compensatory time. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit. However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit.

(c) "Public Safety Activities": The term "public safety activities" as used in section 7(o)(3)(A) of the Act includes law enforcement, fire fighting or related activities as described in §§ 553.210 (a) and (b) and 553.211 (a)-(c), and (f). An employee whose work regularly involves such activities will qualify for the 480-hour accrual limit. However, the 480-hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities. For example, a maintenance worker employed by a public agency who is called upon to perform fire fighting activities during an emergency would remain subject to the 240-hour limit, even if such employee spent an entire week or several weeks in a year performing public safety activities. Certain employees who work in "public safety" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.201)

(d) "Emergency Response Activity": The term "emergency response activity" as used in section 7(o)(3)(A) of the Act includes dispatching of emergency vehicles and personnel, rescue work and ambulance services. As is the case with "public safety" and "seasonal" activities, an employee must regularly engage in "emergency response" activities to be covered under the 480-hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit, since such emergency response activities are not a regular part of the employee's job. Certain employees who work in "emergency response" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.215.)

(e)(1) "Seasonal Activity": The term "seasonal activity" includes work during periods of significantly increased demand, which are of a regular and recurring nature. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation during such period of more than 240 compensatory time hours (the number available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

(2) Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to result in the accumulation during such period of more than 240 compensatory time hours will typically qualify as engaged in a seasonal activity.

(3) While parks and recreation activity is primarily seasonal because peak demand is generally experienced in fair weather, mere periods of short but intense activity do not make an employee's job seasonal. For example, clerical employees working increased hours for several weeks on a special project or assigned to an afternoon of shoveling snow off the courthouse steps would not be considered engaged in seasonal activities, since the increased activity would not result in the accumulation during such period of more than 240 compensatory time hours. Further, persons employed in municipal auditoriums, theaters, and sports facilities that are open for specific, limited seasons would be considered engaged in seasonal activities, while those employed in facilities that operate year round generally would not.

(4) Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue

compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.

* * *

29 C.F.R. § 553.25

§ 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time, shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. This provision, however, does not apply to "other compensatory time" (as defined below in § 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

(c) *Reasonable Period.* (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) *Unduly Disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would

impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

* * *

29 C.F.R. § 553.26

§ 553.26 Cash overtime payments.

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See § 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such time

off may be excluded from the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include

> . . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this "other similar cause" category.

29 C.F.R. § 553.27

§ 553.27 Payments for unused compensatory time.

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than —

(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase *last 3 years of employment* means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of employment after the break in service will be treated as new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be calculated based on the rate(s) in effect during such period.

(d) The term "regular rate" is defined in 29 CFR 778.108. As indicated in § 778.109, the regular rate is an hourly rate, although the FLSA does not require employers to compensate employees on an hourly basis.

* * *

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29 C.F.R. § 553.28

§ 553.28 Other compensatory time.

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered "other" compensatory time. The term "other" compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a non-overtime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are "overtime" hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered "other" compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.

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(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of "other" compensatory time.

(d) The FLSA does not require that the rate at which "other" compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which "other" compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to "other" compensatory time as described above.

* * * *

APPENDIX G — HOUSE REPORT ON THE FAIR LABOR STANDARDS AMENDMENTS OF 1985; OCTOBER 24, 1985

99th Congress
1st Session

Report
99-331

HOUSE OF REPRESENTATIVES

FAIR LABOR STANDARDS AMENDMENTS OF 1985

October 24, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H.R. 3530]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3530) to amend the Fair Labor Standards Act of 1938 to authorize the provision of compensatory time in lieu of overtime compensation for employees of States, political subdivisions of States, and interstate governmental agencies, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, report favorably thereon with an amendment and recommends that the bill as amended do pass.

* * *

Appendix G

V. COMMENTS ON MAJOR PROVISIONS

A. COMPENSATORY TIME

Section (2) of the bill amends section 7 of the Act to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees. The new subsection 7(o), created by this bill, would authorize public employers to provide compensatory time off in lieu of monetary overtime compensation that otherwise would be required by the relevant provisions of section 7 of the Act regarding various types of employees. Compensatory time received by an employee in lieu of cash must be at the premium rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one-half times the regular rate of pay.

One of the main areas of complaint from many state and local government employers, as well as some groups of employees, was the general prohibition against awarding compensatory time off for overtime work in lieu of monetary compensation. The Fair Labor Standards Act customarily has been interpreted by the Secretary of Labor as precluding the use of compensatory time for statutory overtime hours. In addition, consistent with the purposes of the Fair Labor Standards Act, the obligation to compensate employees at the rate of time and one-half created a financial incentive for employers to reduce hours and hire more employees whereas the widespread use of non-premium compensatory time would frustrate the achievement of these objectives.

Previously, as noted in this report, compensatory time within the framework of the Act was limited to compensatory time off within the same pay period, usually to ensure that the employee did not exceed the maximum of

straight time hours permitted under section 7 of the Act. Existing compensatory time systems have also operated within the so called "gap time" between contractual obligations to pay overtime and the requirements of the statute. While "gap time" compensatory time could be accumulated and held beyond the immediate pay period as stipulated in the regulations promulgated by the Secretary of Labor and found at 29 CFR 553.19, these arrangements were nevertheless much more restricted than most traditional compensatory time systems.

While the Committee appreciates the employee protection principles and job creation purposes of the overtime provision of the Fair Labor Standards Act, it also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or longstanding arrangements where compensatory time off was provided for overtime hours worked by the employees. The *Garcia* decision and with it the re-application of the Fair Labor Standards Act to most public employees effectively ended most traditional compensatory time systems. It, therefore, eliminated the freedom and flexibility enjoyed by public employees and the additional options such systems have provided to the public employer faced with extraordinary demands for public services yet constrained by strict limits on available revenue.

Keeping in mind the fundamental protections afforded to employees under the Fair Labor Standards Act, the Committee concludes that compensatory time should be available to state and local government workers and their employers under certain conditions. Accordingly, a new subsection 7(o) is added to the Fair Labor Standards Act to provide state and local government employees with the opportunity to be compensated for overtime hours with compensatory time off in lieu of monetary compensation. Compensatory time would be allowed pursuant to an agreement entered into between the employers or their representative and the employer prior to the performance of the overtime work, or with prior notice to the em-

ployees, provided that the hours for compensatory time granted in lieu of cash are compensated at the premium rate of not less than one and one-half hours for each hour of overtime work. The Committee encourages employers and employees to enter into such mutual agreements to the extent possible.

1. Agreement or understanding

The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and employee, or notice to the employee, prior to the performance of the work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee.

The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with this subsection and the remainder of the Act.

In the case of employees who have no representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding compensatory time in lieu of overtime pay shall be deemed to have

reached an agreement or understanding with these employees as of April 15, 1986. The primary purpose of this provision is to protect those pre-existing practices where employees and employers have utilized compensatory time instead of cash payments for overtime work. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee prior to the effective date of this subsection.

If, however, a regular practice of awarding compensatory time to employees without a representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. A practice of awarding compensatory time in lieu of overtime pay initiated by an employer between the date of enactment and April 15, 1986 would not be a regular practice of sufficient duration to permit the employer to avoid the obligation to enter into an agreement or understanding with, or providing prior notice to, the affected employees.

As mentioned above, the compensatory time provisions are designed to allow the preservation of regular past practices that have proved mutually beneficial to employees and employers, and to afford the parties the opportunity to enter into appropriate agreements allowing the acceptance of compensatory time rather than cash payments.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations. An employee whose work includes on a regular or recurring basis public safety activity, emergency response activity, or seasonal activity may accrue a maximum of 480 hours of compensatory time. Employees performing work in other activities may ac-

crue compensatory time up to a maximum of 180 hours. Hours accrued prior to April 15, 1986, do not count toward these limits. The 480 hour limit represents 320 hours of actual overtime worked, and the 180 hour limit represents 120 hours of actual ovetime worked, times the one and one-half premium rate. Once these limits are reached, an employee either must be paid in cash for additional accrued hours or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time off. For example, if a law enforcement employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue another 30 hours at the premium rate. But if that employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 or 180 hours must be accrued before compensatory time may be used.

The Committee does not intend that employees whose work includes seasonal, emergency response or public safety activity as well as other work be subject to two different limits on accruable compensatory time. As long as the employee's work regularly includes the activities included in the higher cap, the employee will be covered by the higher cap. The Committee does not expect to find that after the enactment of these amendments local government employees are suddenly reclassified with additional designations as emergency personnel. Similarly, the Committee assumes that local government administrators will resist the temptation to assign their clerical employees or their support staff to an afternoon of shoveling snow on the courthouse steps or a day with the ambulance crew simply to bump the compensatory time cap to the higher level. The Committee expects good faith compliance by public employers and would direct the Secretary

of Labor to enforce these amendments so as to prevent such attempts to evade Congressional intent.

Considerable focus has been given to the question of seasonal activity. Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. Obviously, parks and recreation activity in general are primarily seasonal since they experience peak demand during fair weather seasons or other sport seasons and largely dormant periods at other times. Road crews, while not necessarily seasonal workers, may nevertheless have significant periods of peak demand, for instance during the snow plowing or road construction season. In such an instance the snow plow operator/road crew employee would be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap. Auditoriums, theaters, and sports facilities that are open for specific limited seasons, would meet a seasonal test, facilities that operate year round would not. Mere periods of short but intense activity do not make an employee's job seasonal in nature; therefore, clerical employees working increased hours for several weeks on a city budget or processing insurance forms or tax notices would not need the higher compensatory time cap since the limited periods of increased activity could be accommodated within the lower limit. In determining which employees would be considered seasonal, the Secretary of Labor should first determine whether the "seasonal activity" is a regular and recurring aspect of the employees' work and then whether the projected overtime hours during the "season" of significantly increased demand exceeds the number of compensatory time hours available under the lower cap.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued compensatory time subject to this subsection. It is expected that the rate of compensation for cashing out accrued

compensatory time shall be at the presumably higher rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued compensatory time.

The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee is separated from a job voluntarily (including retirement), is terminated by an employer, dies, or otherwise leaves a job. At a minimum, the employee is entitled to be paid for the usual compensatory time at a rate not less than the average rate received by such employee during the last three years of the employee's employment. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of compensatory time, that request should be honored unless to do so would be unduly disruptive. By the term "unduly disrupt," the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June or hunting season probably would not be unduly disruptive.

Appendix G

The Committee is very concerned that public employees in offices with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation. Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work.

* * *

APPENDIX H — SENATE REPORT ON THE FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT; OCTOBER 17, 1985

Calendar No. 348

99th Congress
1st Session

Report
99-159

SENATE

FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT

OCTOBER 17, (legislative day, OCTOBER 15), 1985).—
Ordered to be printed

Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 1570]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended to pass.

* * *

Appendix H

NEED FOR THE BILL

In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into social desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FSLA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsbility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.

Appendix H

The Committee recognizes that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 1—are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet FLSA standards immediately under *Garcia*. Although many jurisdictions commendably and successfully have undertaken to do so, others have expressed an urgent need for lead-time in which to reorder their budgetary priorities while maintaining fiscal stability. As the Committee did under the 1974 amendments, it has again allowed for lead-time for state and local governmnets to comply with the FLSA requirements.

The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements —frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

* * *

Appendix H

VI. Committee Views

A. COMP TIME

A new subsection 7(o) is added to the FLSA to allow state and local government employees to be compensated for overtime hours with compensatory time off ("comp time") in lieu of monetary compensation. Hours for comp time granted in lieu of cash must be compensated at the premium rate of not less than one and one-half hours for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one half times the regular rate of pay.

1. Agreement or understanding

The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee. The agreement or understanding need not be in writing, but a record of its existence must be kept. An employer need not adopt the same method or procedure when reaching such agreement or understanding with different employees. The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and

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voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of comp time so long as those provisions do not conflict with this subsection or the remainder of the Act.

In the case of employees who have no recognized representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding comp time in lieu of overtime pay shall be deemed to have reached an agreement or understanding with these employees as of April 15, 1986. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee employed prior to the effective date of this subsection. If, however, a regular practice of awarding comp time to employees without a recognized representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. Employers may initiate a regular practice of awarding comp time in lieu of overtime pay between the date of enactment and April 15, 1986, so long as that practice is a regular one and is not intended to avoid or undermine the provisions of this subsection.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations. An employee may accrue a maximum of 480 hours of comp time. (Hours accrued prior to April 15, 1986 do not count toward this limit). The 480 hour limit represents 320 hours of actual overtime worked times the one and one-half premium rate. Once this limit is reached, an employee either must be paid in cash for some of the accrued hours

or else must use some comp time before any additional overtime hours may be compensated in the form of time off. For example, if an employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue 30 hours at the premium rate. But if an employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 hours must be accrued before comp time may be used.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued comp time subject to this subsection. The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee leaves his job voluntarily (including retirement), is terminated by his employer, or dies. The rate of compensation for cashing out accrued comp time shall be the rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued comp time. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of comp time, that request should be honored unless to do

so would be unduly disruptive. By "unduly disruptive", the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

* * *

APPENDIX I — CONFERENCE REPORT ON THE FAIR LABOR STANDARDS AMENDMENTS OF 1985; NOVEMBER 1, 1985

99th Congress *1st Session* | HOUSE OF REPRESENTATIVES | Report 99-357

FAIR LABOR STANDARDS AMENDMENTS OF 1985

NOVEMBER 1, 1985.—Ordered to be printed

Mr. HAWKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1570]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * *

Appendix 1

PAYMENT FOR COMPENSATORY TIME UPON TERMINATION OF EMPLOYMENT

The Senate bill provides that upon termination of employment an employee shall be paid for unused compensatory time at the final regular rate received by such employee.

The House amendment provided that payment for unused compensatory time is to be at a rate not less than the average regular rate received by an employee during the last 3 years of the employee's employment.

The conference substitute combines the Senate and House provisions to provide that payment for unused compensatory time is to be at a rate not less than—

(1) the average regular rate received by an employee during the last 3 years of the employee's employment, or

(2) the final regular rate received by an employee, whichever is higher.

SCOPE OF SUBSTITUTION RULE

Under the Senate bill the rules for the treatment of hours of substitute employment apply to employees of a public agency engaged in the same activity.

Under the House amendment the rules for the treatment of hours of substitute employment apply only to employees engaged in fire protection or law enforcement activities (including activities of security personnel in correctional institutions).

The conference substitute is the same as the Senate bill.

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COMPENSATORY TIME LIMIT

Under the Senate bill an employee may not accrue more than 480 hours of compensatory time.

Under the House amendment if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work may accrue not more than 180 hours of compensatory time.

The conference substitute provides that if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work may accrue not more than 240 hours of compensatory time.

* * *

APPENDIX J — REGULATIONS FOR THE IMPLEMENTATION OF SECTIONS 2, 3, 4, 5, AND 6 OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1985 APPLICABLE TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

DEPARTMENT OF LABOR
Wage and Hour Division Employment
Standards Administration
AGENCY: Wage and Hour Division, Employment
Standards Administration, Labor.

29 CFR Part 553
Application of the Fair Labor Standards Act to
Employees of State and Local Governments

52 FR 2012

Friday, January 16, 1987

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations for the implementation of sections 2, 3, 4, 5, and 6 of the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150) applicable to employees of State and local governments. Existing 29 CFR Part 553 has been restructured and retitled "Application of the Fair Labor Standards Act to Employees of State and Local Governments."

Subpart A contains rules on certain statutory exclusions and exemptions, compensatory time provisions, and special recordkeeping requirements applicable to State and local governments and their employees.

* * *

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EFFECTIVE DATE: February 17, 1987.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 523-8305. (This is not a toll-free number.)

TEXT: SUPPLEMENTARY INFORMATION: On April 18, 1986, the Department of Labor published in the Federal Register (51 FR 13402) proposed regulations to implement the changes in the Fair Labor Standards Act (FLSA or Act) resulting from the 1985 Amendments.

These Amendments, which were enacted on November 13, 1985, changed certain provisions of the FLSA as they relate to employees of State and local governments. The legislation was enacted following the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S.Ct. 1005 (February 19, 1985) which held that the FLSA may constitutionally be applied to State and local governments. The Amendments responded to many of the concerns expressed by representatives of many State and local government employer and employee organizations who identified areas in which they believed the application of the FLSA would have adverse effects.

The 1985 Amendments amended the FLSA by including special provisions applicable to State and local government agencies and their employees. The amended Act permits such agencies to grant compensatory time off with pay in lieu of cash overtime wages to their employees under certain

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conditions, permits the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers or in two separate capacities for the same employer, and provides special standards by which volunteers for public agencies are excluded from the Act's coverage (and, therefore, from the FLSA's minimum wage and overtime pay requirements) provided they receive no compensation other than reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof.

Background

In 1966, Congress amended the FLSA to cover employees of certain publicly-operated institutions, principally schools and hospitals. The constitutionality of this extension of coverage under the Act was upheld by the U.S. Supreme Court in Maryland v. Wirtz, 392 U.S. 183 (1968). The Education Amendments of 1972 further extended FLSA coverage to employees of public preschools. Virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 FLSA Amendments were brought under the coverage of the Act by the 1974 Amendments. These Amendments were challenged as unconstitutional and in National League of Cities v. Usery (NLOC), 426 U.S. 833 (1976), the Supreme Court overruled its earlier decision in Maryland v. Wirtz. In NLOC, the Court held that the minimum wage and overtime pay provisions of the FLSA could not be applied constitutionally to State and local government employees who are engaged in traditional governmental activities. However, the Court also held that these provisions could be applied constitutionally to public agency employees engaged in non-traditional activities.

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In the Garcia case, the issue before the courts was whether the FLSA was unconstitutional as applied to employees of public mass transit systems. On February 19, 1985, the U.S. Supreme Court issued its decision overruling NLOC in its entirety, concluding that the "traditional governmental function" test is unworkable and "inconsistent with established principles of federalism."

As a result of this decision, State and local government employees previously determined to be engaged in traditional governmental functions, and thus excluded from the minimum wage and overtime pay provisions of the FLSA, became subject to these provisions.

Discussion of Major Comments

A total of 165 comments were received on the proposed regulations, including many from organizations with national constituencies. Among these were comments from (listed in the order received):

National Public Employer Labor Relations Association (NPELRA).

National Association of Towns and Townships (NATT).

Public Employee Department, AFL-CIO (AFL-CIO).

American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

National Education Association (NEA).

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National Volunteer Fire Council (NVFC).

International Association of Fire Fighters (IAFF).

International Association of Fire Chiefs (IAFC).

National Association of Counties (NAC).

National Conference of State Legislatures (NCSL).

Fraternal Order of Police (FOP).

National League of Cities (NLOC).

International Personnel Management Association (IPMA).

In addition to the substantive comments discussed below, many commenters submitted minor editorial suggestions some of which have been adopted and some of which have not been adopted. Also, a number of commenters requested that the regulations be revised to explain the application of the FLSA to specific hypothetical situations (or ask for specific opinions on fact situations), concerning, for example, hours worked issues. In the Department's view, the regulations, which are intended to have broad, general application, cannot attempt to address such specific issues which, in any event, would require a full examination of all the facts and circumstances in specific cases. Therefore, such comments have not been addressed herein.

* * *

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Section 7(o) Compensatory Time and Compensatory Time Off.

Section 553.20 Introduction.

The NLOC stated that the specific reference to the 40-hour workweek overtime standard in section 7(a) of the Act should be eliminated since compensatory time could be provided to employees who work overtime under other statutory requirements, such as section 7(k). Also, the NLOC recommended that the reference to an "element of flexibility" for the employer and an "element of choice" for employees should be eliminated since collective bargaining requirements could eliminate any elements of flexibility or choice.

The Department agrees that the language in the proposed rule concerning the application of compensatory time could be misleading and has modified the section to note that compensatory time may be provided in lieu of monetary overtime compensation that otherwise would be required by any of the applicable provisions of section 7 of the FLSA. With respect to the second comment, the legislative history indicates that the intent of section 7(o) of the FLSA was "to provide flexibility to State and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees" (H. Rep., p. 19). Accordingly, this suggested revision has not been made. However, to clarify that employee representatives often exercise the employees' element of choice by negotiating the terms of the agreement or understanding, the phrase "or the representatives of their employees" has been added to the second sentence of this section between the words "employees" and "regarding."

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Section 553.23 Agreement or understanding prior to performance of work.

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

The NLOC also suggested replacing the words "in conformance" with the word "consistent" in the sentence in § 553.23(b)(1): "Any agreement must be in conformance with the provisions of section 7(o) of the Act." The Department agrees that the words "in conformance" could be misconstrued to mean that the agreement could not provide standards for use of compensatory time more beneficial than those in section 7(o) of the Act (such as double-time pay, a cap lower than 480 hours for employees engaged in public safety activities, etc.). Furthermore, the NLOC also suggested elsewhere that the regulations make clear that provisions contained in agreements

which "conflict" with section 7(o) are superseded by the Act's requirements.

Both of these comments have merit and the Department has revised the language of the section to address these issues.

The Fraternal Order of Police (FOP) recommended that the proposed rule be revised to state that an existing practice or CBA regarding compensatory time will continue as an agreement or understanding for purposes of section 7(o) of the FLSA even if the parties are operating under the terms of an expired agreement, are in negotiations for a successor agreement, or are engaged in dispute resolution.

The Department has no legal authority under the statutory language or legislative history of the 1985 Amendments to issue rules concerning collective bargaining negotiations between a public agency and their employees regarding compensatory time, except those needed to assure that any such agreements are consistent with the provisions of section 7(o) of the Act. The outcome in such cases is a matter between the parties and is dependent upon the terms of the expiring CBA, any other formal agreements or understandings between the parties, and applicable labor-management relations laws.

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23(b)(1), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists

under State or Federal law. They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggested that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public

agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

The FOP and the Public Employee Department, AFL-CIO (AFL-CIO) disagreed with the statement in the proposal that where there is no employee representative, an agreement or understanding may be evidenced by a notice to the employee that compensatory time will be given and that acceptance will be presumed when the employee fails to object. These commenters indicated that this language in the regulation would permit a unilateral agreement since, because of job realities, an employee is unlikely to object. They stated that if a notice is deemed to meet the statutory requirement of an agreement, more restrictions should be placed on the employer.

The House Report states on page 20 that "The use of compensatory time in lieu of cash must be pursuant to some

form of agreement or understanding between employer and employee, or notice to the employee, prior to the performance of the work." (Emphasis added.) Neither the statute nor legislative history provides any basis for the Department to impose restrictions on the use of a notice to evidence that there is an agreement or understanding.

As discussed above, proposed § 553.23(c) provided that an agreement or understanding may be evidenced by a notice to the employee provided, among other requirements, that the employee accept the compensatory time in lieu of overtime pay after being so notified. The NLOC correctly pointed out that employers should not have to wait for employees to work overtime in order to be certain that the "agreement" requirement has been met. The Department agrees and, in view of the fact that no such requirement is in the statutory language or legislative history of the Amendments, has deleted this requirement.

The NEA argued that in no event should the agreement or understanding to accept compensatory time off in lieu of cash overtime compensation be made a condition of original employment as proposed in § 553.23(c)(1). They suggested that the proposal does not reflect the statutory intent that employees must agree to accept compensatory time off in lieu of overtime pay "freely and without coercion." They stated that the only freedom of choice the potential employee would have in such a case would be the freedom not to accept the position. The NEA argued that the statute gives the employees the right to increase their bargaining power by designating representatives to enter into agreements with employers on the issue of compensatory time. They further argued that potential employees would never have the opportunity to exercise such

power if they were required to accept compensatory time as "a condition of employment." Therefore, the NEA proposed that all references to agreements or understandings to accept compensatory time as a "condition of employment" be deleted from the proposed regulations.

Both the Senate and House Reports clearly provide that the agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may be made a condition of original employment. The Senate Report states: "The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection." (i.e., section 7(o).) (S. Rep., p. 11). The House Report on page 20 provides similar language. Since the language in § 553.23(c) tracks the legislative history on this issue, no change has been made to incorporate this comment.

Finally, the NLOC suggested that the requirement that the employee "knowingly and voluntarily" agree to compensatory time as a condition of employment in this subsection be deleted. However, the Senate Report on page 11 specifically contains this requirement. The House Report also contains similar language on page 20. Accordingly, this change cannot be made.

* * *

Section 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

Many commenters, including the FOP, the National Association of Towns and Townships (NATT) and the NLOC, stated that the definition of "reasonable period" was unclear and needed to be made more specific. It was suggested by the NLOC that employers be permitted to establish a general rule and not be required to examine each request for compensatory time off on a case by case basis. The FOP suggested that outside time limits could be established within which compensatory time must be granted. Others suggested that the scheduling of compensatory time should be solely at the employer's discretion. However, some commenters, including the AFL-CIO, argued that the intent of the Act was to give employees the right to receive compensatory time and not the employer the right to grant.

The legislative history makes it clear that an employee has the right to use some or all of accrued compensatory time within a reasonable time after requesting such use, provided that it does not unduly disrupt the employer's operations (H. Rep., p. 23 and S. Rep., p. 12). The Department believes the use of the term "reasonable" was intended to accommodate varying work practices based on the facts and circumstances of each case. Therefore, it is necessary that each situation be examined on a case by case basis to make a determination of "reasonable period" since no arbitrary rule could be applied in every situation. The proposed revision has, therefore, not been adopted. However, the legislative history does indicate that an employee should not be coerced to accept more compensatory time in lieu of overtime pay than an employer can realistically and in good faith expect to be able to grant to that employee

within a reasonable period of his or her making a request for use of such time. The rule has been modified to make it clear that compensatory time is not envisioned as a means to avoid overtime compensation (H. Rep., p. 23) and that an employee has the right to be able to use the compensatory time earned. However, no specific time frame has been established for use of compensatory time.

With regard to the term "unduly disrupt", many commenters, including the International Association of Fire Chiefs (IAFC), suggested that the term be defined to state that it would be unduly disruptive to grant compensatory time off any time granting such leave to an employee would require another employee to work overtime to perform the services. Also, the NLOC and others disagreed with the statement in this section that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off."

The legislative history to the 1985 Amendments specifically clarifies that the term "unduly disrupt" means something more than mere inconvenience (H. Rep., p. 23 and S. Rep., p. 12). The Reports provide an example that a request by a snow plow operator in Vermont or Maine to use compensatory time in February would probably be unduly disruptive even if the request were made well in advance. On the other hand, the same request by the same employee for compensatory time in June probably would not be unduly disruptive. As stated in the proposed rule, for an agency to refuse an employee's request for compensatory time off, it must be clear that the granting of such compensatory time off must result in an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity. The Department

recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive. In addition, it should be noted that the legislative history (H. Rep., p. 23) states that for those employees where the problem of disruption of services to the public is persistent, compensatory time should not be the preferred method of compensation for overtime work. The Department believes the proposed rule accurately mirrors the legislative intent. Therefore, the suggested revisions are not adopted.

The NLOC suggested deleting § 553.25(b)(2) in the proposal. This subsection states that where the agreement or understanding between the employer and the employee (or the representative of the employee) contains the conditions under which an employee can take compensatory time off, such agreement or understanding will govern the meaning of "reasonable period". The NLOC pointed out that neither the statute nor legislative history of the 1985 Amendments provides for such a rule. The Department, however, believes that some parties may choose to include in their agreement or understanding the conditions or terms regarding the taking of compensatory time off. No useful purpose would be served, in the Department's view, by providing for some further review under the FLSA of the appropriateness of the agreed upon terms. Accordingly, the suggested revision has not been adopted.

Section 553.27 Payments for unused compensatory time.

Various parties, including the National Association of Counties (NAC), commented on the statutory requirement that

at the time of termination an employee must be paid for unused compensatory time based on either the average regular rate received during the last 3 years of employment or the final regular rate received, whichever is higher. Of particular concern was the 3-year period which must be used in making such a determination. It was suggested that only the 3 years prospective to April 15, 1986, be used, since States and local governments not covered by the FLSA prior to that date would be unable to reconstruct payroll records to determine a 3-year average regular rate. Also, it was suggested that the last 3 years of employment be defined as the last 3 years of continuous employment since some employees may have worked a total of 3 years for a public agency, but over a longer period of time. Thus, the rule would require public agencies to maintain payroll records for an indeterminate period of time.

The Department recognizes that State and local government agencies may not have some or all of the records for the period prior to April 15, 1986, needed to calculate the 3-year average regular rate for their terminating employees, and that this lack of 3 years of records may continue to exist for some time, in some cases until April 15, 1989. The Department has no authority to waive this statutory requirement, and thus no changes have been made in this section to incorporate this comment. However, in order to provide for the 3-year transition period following April 15, 1986, the Department has adopted the following enforcement policy with respect to this matter. Where there are no payroll records for the period prior to April 15, 1986 (or where the available records are inadequate to permit the calculation of the regular rate as defined in FLSA section 7(e)), the final regular rate, or the average regular rate in the period between April 15, 1986, and the date of termination, whichever is higher, should be used to calculate

the payment for accrued compensatory time. However, where some or all of the records of employment prior to April 15, 1986, are adequate, including any accurate records maintained by the employee, such records should also be utilized in calculating the employee's average regular rate, even if they do not cover the entire 3-year period prior to termination of employment.

The Department agrees that a literal reading of the statutory requirement that the average regular rate received during the final 3 years of employment could require public agencies to retain payroll records indefinitely in order to provide for circumstances in which an employee's final 3 years of employment are not consecutive. Nothing in the statutory language or legislative history of the 1985 Amendments would suggest that the Congress intended to place such a burden on public agencies. It is the Department's position that the phrase "last 3 years of employment" means the 3-year period immediately prior to termination and has revised this section of the regulations accordingly. Thus, where an employee's last 3 years of employment are not continuous because of a break in service, assuming that the initial separation was intended to be permanent and any accrued compensatory time earned after April 14, 1986, was cashed out at the time of the initial separation, the subsequent period of employment would be treated as a new employment. If the final period of employment is less than 3 years, the average regular rate would be calculated based on the rate(s) in effect during such period.

* * *

Appendix J

II. Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments

Cost Impact of Section 7(o)

Section 7(o) of the FLSA Amendments provided some relief from the imposition of the overtime provisions of the FLSA by permitting, within defined limits, compensatory time off in lieu of monetary payment. Such compensatory time is earned at a rate of not less than one and one-half hours for each hour of overtime. It is this provision which requires a change in the methodologies followed in estimating the impact for the Garcia decision.

Section 7(o) permits covered and nonexempt employees engaged in public safety, emergency response, and seasonal activities to accrue 480 hours of compensatory time. All other covered and nonexempt employees can accrue up to 240 hours of compensatory time. This provides State and local governments and individual employees some flexibility which would not otherwise be available as a result of the Garcia decision. The cost effect of this provision will depend upon the necessity for governments to provide a given service. For example, certain services such as police protection must be maintained consistently, and as a result, the hours of work committed to that activity cannot be reduced or postponed, and additional people with necessary skills are not immediately available. In other words, the demand for and supply of people providing that service are inelastic. Another factor which must be taken into account is the propensity of employees to "bank" or save their compensatory time earned. To the extent that employees "bank" their compensatory time, there will be a delay in the cost impact of the FLSA Amendments.

* * *

Appendix J

For reasons set forth above, 29 CFR Part 553 is revised as set forth below.

Signed at Washington, DC, on this 12th day of January, 1987.

William E. Brock,

Secretary of Labor.

Susan R. Meisinger,

Deputy Under Secretary for Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division.

* * *

51 FR 25710 printed in FULL format.

DEPARTMENT OF LABOR
Wage and Hour Division
AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

29 CFR Part 553
Application of the Fair Labor Standards Act to Employees of State and Local Governments

51 FR 25710

July 16, 1986

ACTION: Publication of Regulatory Impact Analysis; Request for Comment.

SUMMARY: This document provides the Department's regulatory impact analysis for proposed regulations concerning the application of the Fair Labor Standards Act to employees of State and local governments.

DATE: Comments are due on or before July 31, 1986.

ADDRESS: Submit comments to Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC, 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC, 20210, (202) 523-8305. This is not a toll free number.

TEXT: SUPPLEMENTARY INFORMATION: On April 18, 1986, proposed Regulations, 29 CFR Part 553, Application of the Fair Labor Standards Act to Employees of State and Local Governments, were published in the Federal Register (51 FR 13402). Interested parties were afforded the opportunity to submit comments within 45 days after publication. The proposal also included certain preliminary information on costs associated with the Fair Labor Standards Act (FLSA) coverage of State and local governments. In addition, commenters were asked to submit any available data on the economic impact of

the 1985 FLSA Amendments. Subsequent to the publication of the proposed regulations, it was determined that the Department could provide certain additional information on the cost impact of the above proposal. Accordingly, this document provides the Department's preliminary regulatory impact analysis under Executive Order 12291.

Background

After the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S. Ct. 1005 (February 19, 1985), holding that the FLSA may constitutionally be applied to State and local governments, representatives of many State and local government employer and employee organizations identified several areas in which they believed they would be adversely affected by application of the FLSA. On November 13, 1985, the Fair Labor Standards Amendments of 1985 were enacted into law. These amendments changed certain provisions of the FLSA as they relate to employees of State and local governments.

The 1985 Amendments responded to many of these concerns by including special provisions in the FLSA which apply only to employees of State and local governments.

* * *

II. Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments

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Appendix J

FLSA by permitting, within defined limits, compensatory time off in lieu of monetary payment. Such compensatory time is earned at a rate of not less than one and one-half hours for each hour of overtime. It is this provision which requires a change in the methodologies followed in estimating the impact for the Garcia decision.

Section 7(o) permits covered and nonexempt employees engaged in public safety, emergency response, and seasonal activities to accrue 480 hours of compensator time. All other covered and nonexempt employees can accrue up to 240 hours of compensatory time. This provides State and local governments and individual employees some flexibility which would not otherwise be available as a result of the Garcia decision. The cost effect of this provision will depend upon the necessity for governments to provide a given service. For example, certain services such as police protection must be maintained consistently, and as a result, the hours of work committed to that activity cannot be reduced or postponed, and additional people with necessary skills are not immediately available. In other words, the demand for and supply of people providing that service are inelastic. Another factor which must be taken into account is the propensity of employees to "bank" or save their compensatory time earned. To the extent that employees "bank" their compensatory time, there will be a delay in the cost impact of the FLSA Amendments.

* * * *

NO. 98-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD CHRISTENSEN, et al.
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.
Respondents

On Petition For A Writ Of Certiorari
to the
United States Court Of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1688

QUESTION PRESENTED

Does an employer violate the provisions of the Fair Labor Standards Act by shortening an employee's workweek and paying off an equivalent amount of the employee's accrued compensatory time?

PARTIES TO THE PROCEEDING

Petitioners:

Edward A. Christensen; Kenneth O. Adams; David W. Addison; Jose A. Alvarado; Robert Amboree; Bobby G. Andrews; Randy Anderwald; Gary R. Ashford; Craig L. Bailey; Richard Bailey; Richardo E. Balderaz; Herbert V. Barnard; Gerald Barnett; Paulette M. Barnett; Brad T. Bennett; Bridgett Blackmon; Flynt E. Blackwell; Gary F. Blahuta; Scott P. Blankenburg; Deborah Bliese; Bruce H. Breckenridge; J. W. Brooks; Brian Buchanan; Patricia M. Bui; Don E. Bynum; Clarence A. Callis; William M. Campbell; Heather Carr; Thomas J. Carr; Paul E. Carpenter; Robert Casey; Mark E. Cepiel; Eladio C. Chavez; Roy Clark; Denny D. Coker; Alford A. Cook; Gregory P. Cox; Donald D. Crayton; Richard D. Crook; David A. Davis; Gary W. Davis; Christopher E. Dempsey; Russell Dukes; Larry A. Eikhoff; Frank Fairley; David W. Finely; James P. Fitzgerald; Erine R. Fowler; Michael A. Garcia; Thomas M. Gentry; John Godejohann; Robert M. Goerlitz; David Gonzales; Raul V. Gonzales; Miguel A. Gonzalez; Billy Gray; William L. Gray; Lawrence P. Gries; Thomas P. Gurney; Preston R. Halfin; Sammy Head; Neil Hines; Larry D. Howell; Marshall P. Isom; James A. Johnson; Derry L. Jones; David E. Kaup; William C. Kenisell; Howard J. Kimble; Steve Kirk; Edgar D. Knighten; Freddy G. Lafuente; Michael G. LaGrone; Al Lanford; Vernon S. Lemons; Shemei B. Levi; Jeanne Long; Timothy Loyd; Joe S. Magallon; David B. Martin; Pedro Martinez; Russell L. Mayfield; Terry McGregor; Robert C. Meaux; Stephen Melinder; Marty M. Mingo; D. D. Montgomery; Jose L. Morin; Richard O. Newby; Arthur W. Nolley; William R. Norwood; Richard C. Nunnery; Karen D. O'Bannion; Raymond E. O'Bannion; Guadalupe Palafox; Wayne Parinello; Deborah Petruska; James A. Phillips;

Simon C. Ramirez; Michael B. Rankin; James C. Reynolds; Willard G. Rogers; Gerald M. Robinson; Joe Ruffino; Lance J. Scott; Rob R. Self; Donald Shaver; James K. Shipley; James Smedick; Gina K. Spriggs, (Grahmann); Jeffery M. Stauber; Larry L. Strickland; Billy J. Taylor; Kerry Townsend; Richard S. Trenski; Gordon Trott; Ed Trotti; Richard D. Valdez; Dalton E. Van Slyke; Frank L. Vernagallo; Ruben Villarreal; Johnny F. Walling; Gerald R. Warren; James M. Watson; Thomas G. Welch; John H. Wheeler; Joseph L. Williams; Rwanda Wiltz

Respondents:

Harris County, Texas, Tommy B. Thomas, Harris County Sheriff

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STATEMENT OF THE CASE

The parties stipulated that the following is a true and accurate description of the policy of the Harris County Sheriff's Department regarding compulsory use of accumulated compensatory time:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who for purposes of the Fair Labor Standards Act are considered non-exempt, will be maintained below a predetermined maximum level. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that an employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce his or her accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employee and the supervisor. In

> that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision within the Department on an informal basis.

Doc. 24.

Respondents challenge and dispute the following assertion in the Petition to the extent that it might be construed as a statement of fact rather than an unproven allegation:

> ". . . [t]he County failed and refused to grant the Deputies the use of their accumulated compensatory time when they reasonably requested [it]...". (Petition p. 4-5).

This claim was abandoned by Petitioners in the court below. *Moreau v. Harris County*, 158 F.3d 241, 244 (5th Cir. 1998). Further, there is no summary judgment evidence in the record supporting this allegation. Therefore, it has no bearing on the issue before this Court and should not be considered for any purpose.

REASONS FOR DENYING THE WRIT

Although the decision of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995) and the decision of the Fifth Circuit in the instant case are in conflict, resolution of the conflict is irrelevant to the ultimate outcome of this case. In that regard, no error in the judgment of the court below has been shown. Therefore, the petition should be denied.

The statutory provisions in issue in this case were a part of the Fair Labor Standards Amendments of 1985 which were enacted by Congress in response to this Court's decision in *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, this Court determined that the provisions of the Fair Labor Standards Act were applicable to state and local governments. The 1985 Amendments were intended to ease the fiscal transition for state and local governments newly subject to the Act. *Adams v. City of McMinnville*, 890 F.2d 836, 837 (6th Cir. 1989). To that end, the amendments allow public agencies to provide compensatory time in lieu of cash overtime pay if an employee agrees to such an arrangement. In this case, the Petitioners are parties to the requisite agreements. *Moreau v. Klevenhagen*, 508 U.S. 22 (1993). In an effort to balance the employee's right to make use of earned comp time and the employer's need for flexibility in operations, Congress provided that an employee of a public agency shall be permitted to use such time within a reasonable period after making a request if the use of compensatory time does not unduly disrupt the operations of the public agency. 29 U.S.C. § 207(o)(5) (1994 ed.). *See Senate Report No. 99-159, 99th Cong., 1st Sess. (1985)*. It is apparent from the wording of the statute, particularly the nondiscrimination provision, that Congress intended to ensure that the employees of a public agency receive the benefit of the new law by preventing public employers from undermining its provisions. Pub. L. 99-150 § 8, 99 Stat. 791 (29 U.S.C. § 215 note). However, there is no expressed intent that the employee should be able to "bank" his comp time as suggested by the Eighth Circuit in *Heaton v. Moore*. On the contrary, the statute reflects a very different intent by providing that "if compensation is *paid* to an employee *for accrued compensatory time off*, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment". 29 U.S.C. § 207(o)(3)(B) (1994 ed.) (emphasis added). Likewise, applicable federal regulations provide that "payments for accrued compensatory time earned after April 14, 1986, may be made

at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment". 29 C.F.R. § 553.27(a) (1998) (emphasis added). Thus, both the statute and the regulation clearly contemplate a circumstance in which a public employer elects to reduce or eliminate the accrued compensatory time of an employee by making a cash payment. As long as the employee is paid for his accumulated compensatory time at his current regular rate of pay, the statute is satisfied. The Eighth Circuit's view to the contrary is simply erroneous.

The Eighth Circuit came to its erroneous conclusion based upon the maxim of statutory construction *inclusio unius est exclusio alterius*. As the court noted, "[u]nder that principle of construction, 'when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.' " *Heaton*, 43 F.3d at 1180. The court then concluded that "Congress has limited the public employer's control over an employee's use of compensatory time only to situations where an employee's requested use of compensatory time would be 'unduly disruptive' to the public employer's operations". However, the rule that the court relied upon is a "rule of statutory construction and not a rule of law. Thus, it can be overcome by a strong indication of contrary legislative intent or policy". *Sutherland Stat. Const.* § 47.23 (5th ed. 1992). Obviously, in *Heaton* the Eighth Circuit totally ignored the provisions of the statute permitting cash payment for accrued compensatory time. 29 U.S.C. § 207(o)(3)(B). As Justice Thomas stated in *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992), "in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. ... When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete' ". If the literal wording of 29 U.S.C. § 207(o)(3)(B) permits cash payments for accrued compensatory time, no rule of statutory construction can provide otherwise.

The payment provision in subsection (3)(B) must necessarily apply only to pre-termination reductions of accrued compensatory time because subsection (4) covers payment at termination of employment. Who then has the option to reduce accrued compensatory time prior to termination of employment? Pre-termination reductions must be at the *employer's* option because the basic purpose of the 1985 Amendments was to ease the burden on public employers resulting from the *Garcia* decision. If it were the employee's option to demand payments for accrued comp time under subsection (3)(B), the employer's option to substitute compensatory time for cash payments for overtime worked would become meaningless. The employee could always ask for the cash whenever he or she wanted it. Thus, the words used by Congress in 29 U.S.C. § 207(o)(3)(B) nullify the analysis employed by the Eighth Circuit in *Heaton*. Further, the inclusion of subsection 3(B) in the statute makes manifest the importance of correct issue identification in the instant case. Petitioners frame the issue as follows:

> The question presented here is whether under 1985 compensatory time amendments to the FLSA, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20-553.28, and the Secretary of Labor's considered interpretations and rulings thereon, a local governmental entity which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employer permitting such compulsion, compel employees to utilize or burn their accumulated compensatory time involuntarily, that is, when they do not request it?

Respondents submit that the issue is more accurately stated as follows:

> Does an employer violate the provisions of the Fair Labor Standards Act by shortening an employee's workweek and paying off an equivalent amount of the

employee's accrued compensatory time?

This formulation of the issue is more appropriate because it focuses upon the practical effect of the policy in question. When the Petitioners are asked to utilize a portion of their compensatory time, they are not required to report for work and they receive compensation at their current regular rate of pay for the amount of comp time utilized. Thus, their hours of work are reduced and they receive cash compensation for overtime hours previously worked. Neither of these "effects" of the policy is prohibited by the Fair Labor Standards Act.

Similarly, in *Adams v. City of McMinnville*, 890 F.2d 836 (6th Cir. 1989), the public employer had unilaterally changed the work schedule of its firefighters. The effect of the change was to reduce the total number of hours each firefighter worked so that overtime pay would not be required. The firefighters alleged that this constituted discrimination prohibited by the Fair Labor Standards Act. The Sixth Circuit noted that the city did not attempt to alleviate the fiscal predicament threatened by the *Garcia* decision by reducing the firefighters' effective hourly pay rate, while requiring them to work the same number of hours. The court concluded that "[w]hen a public employer responds to fiscal pressures created by the FLSA by reducing employees' hours in order that they not work overtime, thereby eliminating the city's need to pay premium wages for overtime, the employer does not violate Section 8" of the Fair Labor Standards Amendments of 1985. The court stated that legislative history explicitly distinguishes between a public employer who responds to the application of the FLSA to its employees by reducing their regular hourly pay rate and an employer who simply reduces the overtime hours its employees will work. Quoting from the legislative history, the court said the following:

The Conference Committee noted that

> [a] unilateral reduction of regular pay or fringe benefits that is intended to nullify this legislative application of overtime compensation to State and local government employees is unlawful. Any other conclusion would in effect invite public employers to reduce regular rates of pay shortly after the date of enactment so as to negate the premium compensation mandated by this legislation.

Joint Explanatory Statement of the Committee of Conference, H.R.Conf.Rep. No. 357, 99th Cong., 1st Sess. 9, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 670. In contrast, the Conference Committee also stated that "[a]n employer's adjustment of work schedules to reduce overtime hours would not constitute discrimination under this provision so long as it was not undertaken to retaliate for an assertion of coverage." *Id.* at 8, 1985 U.S. Code Cong. & Admin. News 670.

890 F.2d at 840.

Respondents submit that the Sixth Circuit, like the Fifth Circuit in the instant case, correctly analyzed the 1985 amendments. As noted by this Court in *Crandon v. U.S.*, 494 U.S. 152 (1990), in determining the meaning of a statute, the courts must look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. When one analyzes the

1985 Amendments in that light, it is clear that the comp time policy in issue in this case does not contravene the provisions of the Fair Labor Standards Act. It was not the object of the Amendments to create a new form of "savings account" for public employees. It was to accommodate the needs of the States and their political subdivisions while ensuring (1) that public employees receive premium rate compensation for overtime worked and (2) that "payment" not be delayed unreasonably.

Petitioners contend that "[i]n failing to give controlling deference to the regulations and interpretation of the Secretary of Labor" in this case, the Fifth Circuit erred in its application of the Fair Labor Standards Act. They base this on the statement in the majority opinion that "Congress has not spoken clearly in the text of the statute itself or in the legislative history". Petition, p. 24-25. First, it should be noted that this argument is a significant departure from the Petitioners' argument in the court below. There they asserted that the county's policy concerning compulsory use of compensatory time "contravenes the **plain language** of the 1985 Amendments to the Act". (emphasis added) Appellees' Brief, p. 13. Now, however, Petitioners apparently embrace the argument that the statute is silent or ambiguous with respect to the specific issue before the Court. As reiterated by this Court in *Auer v. Robbins*, 519 U.S. 452 (1997), arguments which are inadequately preserved in prior proceedings are not considered in this Court. Thus, Petitioners have waived the argument which forms the central theme of their Petition. In the event that the Court nevertheless elects to consider the Petitioners' argument, Respondents submit that the argument is flawed. In that regard, it is simply inaccurate to contend that Congress has not spoken to the question at issue. As this Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-843 (1984), "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress".

Respondents submit that the intent of Congress expressed in the 1985 Amendments is clear with respect to the issue in this case. Again, as noted above, correct issue identification is of the utmost importance. Certainly, 29 U.S.C. § 207(o) contains no provision *expressly* stating that an employer may or may not compel employees to utilize compensatory time involuntarily. However, the statute does make clear that an employer may pay off accrued compensatory time at the employee's current hourly rate prior to the termination of employment. 29 U.S.C. § 207(o)(3)(B). The statute contains no restriction on the amount of compensatory time which may be paid off by the employer. Thus, the employer is free to pay off the entire compensatory time balance or as little as a single hour at any time. Further, the Fair Labor Standards Act addresses only a minimum wage rate and *maximum* hours of work. It does not guarantee a minimum number of hours of work per week. Consequently, the employer may shorten the employee's workweek without violating the Act. If the employer may do these things separately without violating the Act, it may do them in combination as well by ordering the employee to use a portion of his or her accrued comp time. Thus, the intent of Congress is clearly expressed in the statute and the Secretary of Labor's interpretation is not the "reference point which *controls* judicial application of the statute" as the Petitioners now contend. However, it should be noted that the applicable federal regulation is in no way contrary to the Respondents' position in this case. See 29 C.F.R. § 553.27(a) (payments for accrued compensatory time may be made *at any time* and shall be paid at the regular rate earned by the employee at the time the employee receives such payment).

As stated in the Fifth Circuit's opinion, "the economic incentives at stake are clear". *Moreau v. Harris County*, 158 F.3d 241, 245 (5th Cir. 1998). Tight budgets require that public

employers such as Harris County seek to limit the accrual of compensatory time in order to avoid paying cash overtime wages when the accrued amount of time reaches the statutory maximum. The Petitioners on the other hand wish to accumulate comp time up to the statutory maximum in order to receive cash payments for overtime work. Further, if the accrued comp time can be "banked" until termination of employment it provides a large severance payment to the employees and a correspondingly large budgetary problem for the County. Congress enacted the 1985 Amendments to assist local governments to avoid such budgetary problems. Therefore, Respondents submit that having a policy which seeks to limit the accrual of compensatory time is in no way contrary to congressional purpose and is in fact more in line with such purpose than is the position of the Petitioners in this case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 98-1167

In The Supreme Court of the United States

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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This is a dispute between Harris County, Texas, Deputy Sheriffs and their employer over whether compensatory time banks earned under the Fair Labor Standards Act, 29 U.S.C. § 207(o) may be depleted by compelling an employee to take compensatory time off in work periods in which the employee has no desire to do so. The deputies have sought *certiorari* requesting the Court to resolve a clear conflict between Circuit Courts of Appeals' interpretations of 29 U.S.C. § 207(o) with regard to the preservation and use of compensatory time earned in lieu of cash overtime.

The Respondent, Harris County, argues that this Petition should be denied because the admitted conflict between the Eighth Circuit's decision in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert denied sub nom., Schriro v. Heaton*, 515 U.S. 1104 (1993) and the Fifth Circuit's decision below is somehow "irrelevant to the outcome of this case."

Harris County's argument rests on their claims: (1) that, even under *Heaton*, the County is entitled to summary judgment, and that (2) the *plain language* of the 1985 Amendments to the Fair Labor Standards Act provisions on compensatory time entitles them to summary judgment. Each of these propositions is faulty.

Heaton clearly supports the proposition that an employer may not compel employees to take compensatory time off as a means of depleting compensatory time banks. Just as clearly, there is no *plain language* in the statute that resolves this dispute.

First, the decision below is clear on its face that if *Heaton* had been followed in this case, the County would not be entitled to summary judgment. The majority writes that:

> Relying on the Eighth Circuit's opinion in *Heaton*, the class urges that since "banked compensatory time is the property of the employee," they have the right to "bank" comp time in "what amounts to an employee-owned savings account of compensatory time.". . .. In *Heaton*, the employer sought to require use of comp time before the use of annual leave. This case squarely presents the *Heaton* issue, and we must thus decide whether to extend *Alford* or to follow *Heaton*. . . . The reasoning in *Heaton* is flawed. App. at 10a.

While Judge Dennis in partial dissent recognizes the conflict with *Heaton*, he would remand the case to the trial court for reconsideration in light of *Auer v. Robbins*, 519 U.S. 452 (1997).

Second, neither the *plain language* of 29 U.S.C. § 207(o)(3)(B) nor an alleged single-minded, budget protection purpose of Congress in amending the FLSA to allow public sector compensatory time off in lieu of cash overtime support Harris County.

Harris County would read the first clause of 29 U.S.C. § 207(o)(3)(B) as a *plain language* statement of a Congressional intent that employers may compel employees, against their wishes, to use accrued compensatory time off. The County reads that clause as a grant of employer control over compensatory time banks. In fact, the clause is a

condition on the main clause of the sentence in which it is contained. The Congress legislated that "If compensatory time is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives that payment." 29 U.S.C. § 207. Harris County reads that as a *plain language* Congressional authorization for an employer to compel employees to burn off their compensatory time banks during work periods when the employee would prefer to preserve the bank. In fact, all the sentence does is set the rate at which compensatory time must be paid for when it is cashed out. Far from authorizing compensatory time to be bought out over the employees' objection, the provision only protects employees from employers who would seek to buy out compensatory time at low rates. A reading of the entire 1985 Amendments leaves no doubt that there are many occasions when compensatory time may be bought out, including at the cessation of employment or with the agreement of the employees. The *plain language* cited by Harris County does not expressly provide that an employer may force employees to use their compensatory time.

The Courts of Appeal which have addressed the question each agree that the *plain language* of the statute does not resolve the issue. See, this decision at App. A at 10a-11a and *Heaton* at 43 F.3d 1180. There is simply no foundation for the claim that the issue here is resolved by the *plain language of the statute*.

Further Harris County misreads the legislative history of the compensatory time off provision. Harris County claims

that the 1985 Amendments had a singular purpose -- "to assist local governments to avoid budget problems." There are two serious problems with this reading of the legislative history: (1) the 1985 Amendments, in fact, have a dual purpose of balancing the financial burden of FLSA compliance with the work spreading/worker protection goals of the Act; and (2) the published legislative history of the Amendments expressly contradicts Harris County's reading.

The 1985 Amendments to the FLSA had a dual purpose. As the Fifth Circuit explained:

> Rather than completely exclude agencies from the reach of the FLSA, Congress balanced the burden of complying with the FLSA's overtime provision *with protection for the worker*. The 1985 Amendments accomplished this *dual* purpose by allowing public employers to agree with empl[illegible]es to award comp time in lieu of monetary [illegible]nents .... App. at 9A (emphasis added)(citation omitted).

The importance of protecting the rights of the employee is also emphasized in the legislative history to the 1985 Amendments to the FLSA.

> While the Committee appreciates the employee protection principles and job creation purposes of the overtime provision of the Fair Labor Standards Act, it also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or

> longstanding arrangements where compensatory time off was provided for overtime hours worked by employees. Appendix at 62a.

The Committee further explained:

> The Committee is very concerned that public employees in offices with regular year-round functions, short staff, and steady demand will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to the employee if he or she requests it within a similar period. To do otherwise, would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation. Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but

> unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work. App. at 68a.

CONCLUSION

For these reasons and the reasons previously stated in the initial Petition, the Court should grant *certiorari*.

Respectfully Submitted,

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No. 98-1167

In the Supreme Court of the United States

EDWARD CHRISTENSEN, ET AL., PETITIONERS

v.

HARRIS COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(*o*), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay their employees a minimum wage and to compensate overtime work at a rate of one and one-half times the employees' regular rate of pay. 29 U.S.C. 206, 207. Public agencies, including federal agencies and state and local governments, are subject to the FLSA. 29 U.S.C. 203(d), (s)(1)(C) and (x). This Court has held that application of the FLSA's minimum wage and overtime provisions to state and local governments

is a valid exercise of Congress's power to regulate interstate commerce. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which in turn had overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)).[1]

In 1985, in response to *Garcia*, Congress amended the FLSA to provide state and local governments a temporary period of relief from liability and to address certain other public agency concerns. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-791. One of the 1985 amendments (codified at 29 U.S.C. 207(*o*)) permits employees of state and local governments to receive, "in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required." 29 U.S.C. 207(*o*)(1). A public agency may provide compensatory time "only—

> (A) pursuant to —
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

29 U.S.C. 207(*o*)(2).[2] The applicable limit is 480 hours of compensatory time for "work in a public safety activity, an emergency response activity, or a seasonal activity," and 240 hours for any other work. 29 U.S.C. 207(*o*)(3)(A). An employee who reaches the applicable limit "shall, for additional overtime hours of work, be paid overtime compensation." *Ibid.*

For all employees, payment for accrued compensatory time off must be "at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. 207(*o*)(3)(B). An employee with accrued compensatory time also has a right to be paid for it at specified rates on termination of employment. 29 U.S.C. 207(*o*)(4). An employee who requests to use accrued compensatory time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. 207(*o*)(5).

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[1] In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that Congress lacks the power under Article I of the Constitution to abrogate a State's sovereign immunity from suit in federal court. In *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), the Court held that sovereign immunity also protects a State from FLSA suits for money damages by private parties in state courts. State sovereign immunity, however, "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 119 S. Ct. at 2267. Respondent Harris County has not argued that it is immune from suit in this case.

[2] For employees subject to Section 207(*o*)(2)(A)(ii) who were hired before April 15, 1986, "the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding." 29 U.S.C. 207(*o*)(2).

2. The 1985 amendments direct the Secretary of Labor to "promulgate such regulations as may be required to implement [the] amendments." Section 6, 99 Stat. 790 (29 U.S.C. 203 note). Pursuant to that directive, the Department of Labor promulgated 29 C.F.R. Pt. 553. Among other things, those regulations provide that an agreement or understanding regarding payment of compensatory time may include "provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section [207(*o*)]." 29 C.F.R. 553.23(a)(2). Inconsistent provisions are "superseded" by the statute. *Ibid.*

When employees do not have a recognized representative, a state or local government's agreement or understanding with an individual employee may "take the form of an express condition of employment," provided that the employee knowingly and voluntarily agrees to the condition and is informed "that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section [207(*o*)]." 29 C.F.R. 553.23(c)(1).[3]

3. In *Moreau* v. *Klevenhagen*, 508 U.S. 22, 35 (1993), this Court held that respondent Harris County is governed by 29 U.S.C. 207(*o*)(2)(A)(ii), the provision requiring agreements or understandings with individual employees, rather than 29 U.S.C. 207(*o*)(2)(A)(i), the provision requiring an agreement with the employees' representative. The County has reached agreements that provide for the granting of compensatory time off to its employees. Pet. App. 29a-31a; *Moreau*, 508 U.S.

[3] For employees hired before April 15, 1986, the "regular practice" that the statute permits to serve as an agreement must also conform to the provisions of Section 207(*o*). 29 C.F.R. 553.23(c)(2).

at 29. The County's Sheriff's Department has a policy under which each employee's accrued compensatory time is kept below a level determined by each bureau commander. Pet. App. 29a. When an employee appears to have accumulated hours approaching the maximum allowed by the FLSA, the employee is asked to take steps voluntarily to reduce his or her accumulated hours. *Id.* at 30a. If the employee does not do so, the employee's supervisor may order him or her to do so. *Ibid.* The Sheriff's Department attempts to arrange a mutually agreeable time for the employee to use the hours, but if an agreement cannot be reached, the supervisor may order the employee to use the hours at a time that will best serve the personnel requirements of the bureau. *Ibid.* An employee dissatisfied with the supervisor's order may complain on an informal basis to a supervisor at a higher level in the Department. *Ibid.*; see also *id.* at 4a, 25a.

4. a. Petitioners are deputy sheriffs who have not yet accumulated 240 hours of compensatory time, the lower limit permitted by 29 U.S.C. 207(*o*)(3)(A). Pet. 4; Pet. App. 25a. In April 1994, they brought a class action against respondents Harris County and its sheriff, alleging that respondents violated Section 207(*o*) of the FLSA by refusing to allow petitioners to use their accumulated compensatory time when they requested it, forcing them to use it when they did not request it, and retaliating against them. Pet. 4-5; see Pet. App. 3a. The parties stipulated to the facts, discussed above, concerning the County's policy. Pet. App. 4a, 29a-31a.

b. In November 1996, the district court granted summary judgment to petitioners. Pet. App. 24a-27a. Following *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), the court concluded that, under Section 207(*o*), compensatory

"time off must be consumable by the worker on the worker's terms." Pet. App. 25a. The court reasoned that a public employer may control an employee's use of compensatory time only when an employee's requested use of that time would disrupt the employer's operations, and it found no suggestion in this case of any disruption of the County's operations. *Id.* at 26a-27a.

In July 1997, the district court entered what it termed its "Final Judgment." Pet. App. 28a. That judgment stated that the County "may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act," and it awarded attorney's fees to petitioners. *Ibid.* Petitioners did not ask the district court to rule on their claims based on the County's alleged refusal of permission to use compensatory time when requested and its alleged retaliation, and the court did not do so. *Id.* at 5a.

5. a. The court of appeals reversed. Pet. App. 1a-23a. The court first concluded that it had jurisdiction because the district court had decided all claims that petitioners had not abandoned. *Id.* at 5a-6a.[4] Turning to the merits, the court held that the County could

[4] The parties have not questioned the court of appeals' conclusion that petitioners abandoned the claims on which the district court did not rule. See also Br. in Opp. 2 (endorsing that conclusion). The ruling of the court of appeals that it had jurisdiction if the district court intended its judgment to dispose of all remaining claims is consistent with the views of other courts of appeals. See, *e.g.*, *Baltimore Orioles, Inc.* v. *Major League Baseball Players Ass'n*, 805 F.2d 663, 666-667 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987); *General Time Corp.* v. *Padua Alarm Sys., Inc.*, 199 F.2d 351, 358 (2d Cir. 1952), cert. denied, 345 U.S. 917 (1953); 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.7, at 547 & n.14 (2d ed. 1992).

require its employees to use their compensatory time sooner than they preferred. *Id.* at 6a-13a.

The court rejected petitioners' argument that the FLSA confers on employees an unrestricted right to use accumulated compensatory time, subject only to the limitation in 29 U.S.C. 207(*o*)(5) that the use of such time not unduly disrupt the operations of the public agency. Pet. App. 8a. That provision is inapplicable, the court reasoned, because it is triggered only when an employee first requests to use compensatory time. *Id.* at 8a-9a. The court also reasoned that 29 U.S.C. 207(*o*)(3)(B), which recognizes a public employer's ability to pay down accrued compensatory time, reflects a "Congressional intent to permit public employers to control the accrual of comp time." Pet. App. 9a. Against this background, the court concluded that Congress did not consider the question whether an employer could require employees to use compensatory time. *Id.* at 10a. Because the court found it impossible to determine how Congress would have legislated on that question, the Court decided to "devis[e] [its] own solution." *Ibid.*

The solution devised by the court of appeals was that, absent an agreement to the contrary, an employer may require its employees to use accrued compensatory time against their will. See Pet. App. 10a-13a. The court believed that its "default rule" was appropriate because it reflected "the general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary." *Id.* at 13a.

The court of appeals recognized that the Eighth Circuit in *Heaton* had reached a different conclusion, but it rejected *Heaton*'s reasoning as "flawed." Pet. App. 10a. The court observed that it could nevertheless follow *Heaton* on prudential grounds, or to avoid an

intercircuit conflict. *Id.* at 11a. The court chose not to do so, however, because it believed *Heaton* was in tension with the Fifth Circuit's own prior decision in *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (1998), which held that a public employer may require employees to use compensatory time before using accrued leave.[5] Pet. App. 11a. The court did not consider the lack of uniformity with *Heaton* to be "a substantial concern" because state and local governments and their employees could contract for a different result under 29 C.F.R. 553.23(a), which permits agreements concerning compensatory time so long as they do not contradict the FLSA. Pet. App. 11a-12a. Because the parties in this case had not identified any such agreement, the court applied the "background rule" that it believed it had an "obligation" "to fashion." *Id.* at 12a. Applying that rule, the court entered judgment for respondents. *Id.* at 14a.

b. Judge Dennis dissented. Pet. App. 14a-23a. He agreed with the majority that the statute does not answer the question presented, but concluded that the Department of Labor's regulations do and are entitled to deference. *Id.* at 14a-19a. In the dissent's view, the regulations do not give control over the use of accrued compensatory time to either the employee or the employer but instead allow the parties to reach an agreement on the preservation, use, or cashing out of compensatory time, so long as any such agreement is

[5] *Local 889* reasoned, contrary to *Heaton*, that 29 U.S.C. 207(*o*) creates no right in accrued compensatory time. See Pet. App. 10a; *Local 889*, 145 F.3d at 285. *Local 889* distinguished *Heaton*, however, on the ground that the State in *Local 889*, unlike the employer in *Heaton*, did not force employees to take time off, but rather only required the use of compensatory time once an employee had requested leave. See *Local 889*, 145 F.3d at 285.

consistent with Section 207(*o*). *Id.* at 18a. Absent an agreement, Judge Dennis concluded, an employer may not require an employee involuntarily to use accrued compensatory time. *Ibid.*

Judge Dennis observed that agreements between respondent Harris County and individual employees providing for compensatory time in lieu of monetary overtime apparently exist, Pet. App. 20a (citing *Moreau*, 508 U.S. at 29), and he would have taken judicial notice of their apparent existence. *Ibid.* Because the agreements are not in the record, however, he would have remanded to allow the district court to consider whether the agreements contain provisions that permit respondents to require petitioners to use accrued compensatory time, and, if so, whether those provisions are consistent with Section 207(*o*). *Ibid.*

DISCUSSION

The petition for a writ of certiorari should be granted. The decision of the court of appeals is incorrect. This Court's review is warranted because the decision conflicts with *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), and the question presented is an important one.

1. Although the court of appeals correctly observed that 29 U.S.C. 207(*o*) does not explicitly address whether a public employer may force its employees to use accrued compensatory time (Pet. App. 10a), the court erred in concluding that it could therefore "fashion" its own "background" or "default" rule (*id.* at 12a) without regard to the text and purpose of Section 207(*o*) and the Secretary of Labor's implementing regulations and interpretative guidance. Those guideposts for statutory interpretation establish that a public employer may not direct its employees to use accrued

compensatory time absent an agreement that authorizes it to do so.[6]

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[6] This case does not present the question whether a public employer and its employees may agree to give the employer some control over when the employees use their compensatory time, a question on which there is no conflict among the courts of appeals. The Department of Labor has taken the position that such agreements are permissible provided they are consistent with Section 207(*o*). See 29 C.F.R. 553.23(a)(2) (agreements may include provisions governing the "preservation, use, or cashing out" of compensatory time so long as they are consistent with Section 207(*o*)); 6A Wage & Hour Man. (BNA) 99:5212, 99:5213-99:5214 (July 29, 1988); Opinion letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100; Opinion letter from Wage & Hour Div., Dep't of Labor (Apr. 4, 1994), *available in* 1994 WL 1004765; but see Br. of Sec'y of Labor as Amicus Curiae at 13 n. 7, *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (5th Cir. 1998) (although the issue was not presented, expressing the view that such agreements would not be lawful, albeit without mentioning the contrary position taken by the Secretary in the regulation and opinion letters cited above).

Agreements inconsistent with Section 207(*o*) would violate the well-established principle that FLSA rights may not be waived. See, *e.g.*, *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981). An agreement to cede control over the use of compensatory time would be consistent with Section 207(*o*) if the agreement promoted the employer's flexibility to offer compensatory time in lieu of overtime pay (*e.g.*, by requiring an employee to use accrued compensatory time as he or she approached the statutory maximum), and, at the same time, preserved for the employee a sufficiently broad range of choices for using compensatory time that it retained its essential attributes as a form of compensation that substitutes for overtime pay. See 29 C.F.R. 553.20 (Section 207(*o*) "provides an element of flexibility to state and local government employers and an element of choice to their employees * * * regarding compensation for statutory overtime hours."); p. 11, *infra* (discussing function of compensatory time as a substitute for wages); p. 15, *infra* (explaining congressional intent

Section 207(*o*) is "an exception to the general FLSA rule mandating overtime pay for overtime work"—an exception under which a public employer and its employees may agree that the employees will receive compensatory time off "in lieu of overtime compensation," 29 U.S.C. 207(*o*)(1). See *Moreau* v. *Klevenhagen*, 508 U.S. 22, 34 n.16 (1993). As the Department of Labor has explained, an employee's accrued compensatory time therefore "belongs to the employee" and is generally under the employee's control, just as an employee's overtime wages must be paid unconditionally or "free and clear," 29 C.F.R. 531.35. See 60 Fed. Reg. 2180, 2206-2207 (1995) (discussing relationship of compensatory time to leave under the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*). Just as an employee "would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses," *Heaton*, 43 F.3d at 1180, absent a lawful agreement to the contrary or undue disruption of the employer's operations, see 29 U.S.C. 207(*o*)(5); 29 C.F.R. 553.23, 553.25; note 6, *supra*.

The Department of Labor accordingly has construed Section 207(*o*) not to authorize a public employer, in the absence of an agreement, unilaterally to require an employee to use accrued compensatory time. See Opinion letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100 (Absent an agreement, "neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time."); see also Br. of Sec'y of

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that compensatory time agreements promote employee "freedom and flexibility").

Labor as Amicus Curiae at 6-11, *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (5th Cir. 1988) (employer may not require employee to use compensatory time rather than annual leave because, absent undue burden on the employer, the employee may control use of accrued compensatory time). That interpretation of Section 207(*o*) of the FLSA is reasonable and therefore entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 462 (1997).

The terms of Section 207(*o*) reflect the general principle that the employee controls the use of his or her accrued compensatory time, absent an agreement to the contrary. Section 207(*o*) identifies only one circumstance in which an employer may unilaterally control an employee's use of accrued compensatory time—when the employee has requested use of accrued time and that use would "unduly disrupt" the employer's operations. 29 U.S.C. 207(*o*)(5). If Congress had intended that the employer could impose other limitations on the use of compensatory time, it presumably would have so provided. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Here, however, the court of appeals held that an employer not only may narrow the range of circumstances in which an employee may use accrued compensatory time, but also may affirmatively require the employee to use compensatory time even if the employee would prefer not to do so. Reading into Section 207(*o*) such additional employer rights unilaterally to control the preservation and use of compensatory time would be inconsistent with the function of compensatory time as substitute compensation and would impermissibly "enlarge[] by implication" the exception provided by Section 207(*o*). *Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 35 (1987). See *Moreau*, 508 U.S. at 33 (applying to Section

207(*o*) the "well-established rule that 'exemptions from the [FLSA] are to be narrowly construed'").[7]

Furthermore, "employers may take advantage of the benefits [that Section 207(*o*)] offers 'only' pursuant to certain conditions set forth by Congress." *Moreau*, 508 U.S. at 34 n.16 (quoting 29 U.S.C. 207(*o*)(2)). One of those conditions is that an employer may substitute compensatory time for paid overtime "only" pursuant to "an agreement or understanding arrived at between the employer and employee." 29 U.S.C. 207(*o*)(2)(A)(ii). Department of Labor regulations provide that the agreement or understanding may include "provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with [Section 207(*o*)]." 29 C.F.R. 553.23(a)(2). See also H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985) ("The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with [Section 207(*o*)] and the remainder of the Act."); S. Rep. No. 159, 99th Cong., 1st Sess. 11 (1985) (same). As the Department of

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[7] As the court of appeals noted (Pet. App. 9a), 29 U.S.C. 207(*o*)(3)(B), which provides that payment for accrued compensatory time must be "at the regular rate earned by the employee at the time the employee receives such payment," rests on the assumption that an employer may pay down accrued compensatory time. See 29 C.F.R. 553.27(a). That provision does not, however, as the court of appeals mistakenly believed (Pet. App. 9a), "reflect[] Congressional intent to permit public employers to control the accrual of comp time" as a general matter. Rather, it establishes only that employers may do what the FLSA requires them to do apart from Section 207(*o*)—pay for overtime work at one and one-half times the employee's regular rate of pay. There is no suggestion in Section 207(*o*) that an employer may reduce accrued time without paying for it.

Labor explained in its September 14, 1992, Opinion letter (see p. 11, *supra*), an employer's unilateral imposition of conditions on the use of compensatory time would be inconsistent with the statutory requirement that compensatory time be provided "only" pursuant to an "agreement or understanding," terms that require a meeting of minds or mutual assent, see *Black's Law Dictionary* 62, 1369 (5th ed. 1979).[8]

Allowing an employer to force employees to use accrued compensatory time without an agreement on that issue would also undermine the requirement that an agreement or understanding concerning compensatory time be reached "before the performance of the work." 29 U.S.C. 207(*o*)(2)(A)(ii). An employer who could unilaterally impose or alter the conditions under which employees may use accrued compensatory time would have little incentive to agree to terms concerning its preservation or use before work is performed. Instead, the employer's incentive would be to wait until an employee had already performed the work and accepted compensatory time instead of overtime pay and then to impose conditions that might be objectionable to the employee.[9]

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[8] The statutory requirement that compensatory time be granted only pursuant to an agreement supersedes the background principle that an employer may generally set workplace rules, the primary ground on which the court of appeals relied to justify its default rule, see Pet. App. 13a.

[9] Allowing employers unilaterally to require employees to use accrued compensatory time would also be in tension with the second major condition that Congress imposed on an employer's invocation of Section 207(*o*): An employer may provide compensatory time rather than overtime pay "only * * * if the employee has not accrued compensatory time in excess of the [statutory] limit." 29 U.S.C. 207(*o*)(2)(B). An employee who has accrued compensatory time off equal to the statutory maximum "shall, for additional overtime hours of work, be paid overtime compensation." 29 U.S.C. 207(*o*)(3)(A). That requirement would have little force if employers could prevent employees from reaching the maximum by unilaterally requiring them to use their accrued time.

Finally, reading Section 207(*o*) to allow employers unilaterally to direct their employees when to use compensatory time would eliminate much of the "freedom and flexibility enjoyed by public employees" (as well as by their employers) that Congress intended to preserve in the 1985 amendments by authorizing compensatory time arrangements. See H.R. Rep. No. 331, *supra*, at 19-20. See also *Fair Labor Standards Amendments of 1985: Hearings on S. 1570 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 17, 96, 109-110, 275, 311, 321, 374-375, 492-493, 520, 573 (1985); *Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 4, 71, 160, 205, 224-225 (1985) (describing how compensatory time arrangements allow employees to take extended vacations, get away from job stresses when necessary, and deal with family or personal matters). By allowing employers to direct the use of accrued compensatory time, the decision of the court of appeals could prevent employees, without their consent, from accruing amounts of compensatory time sufficient for such purposes as an extended vacation, serious surgery, or caring for young children or elderly parents.[10]

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[10] Respondents suggest (Br. in Opp. 5-6, 9) that the practice at issue here is lawful because, by forcing an employee to use his or her compensatory time, the County is, in essence, simply shortening the employee's work week and cashing out the employee's accrued compensatory time. The unilateral combination of work-

2. This Court's review is warranted to resolve a conflict between, on the one hand, the decision of the court of appeals in this case and a recent decision of the Ninth Circuit to the same effect, *Collins* v. *Lobdell*, No. 98-35655, 1999 WL 639131 (Aug. 24, 1999), and, on the other hand, the Eighth Circuit's decision in *Heaton*. In *Heaton*, the Eighth Circuit held that a public employer may not unilaterally control an employee's use of accrued compensatory time unless an employee's requested use of compensatory time would unduly

week shortening and compensatory-time cash-out described by respondents is not permitted by the FLSA, however, because it is a manipulation of work schedules designed to circumvent the requirement in Section 207(*o*) that compensatory time be governed by a preexisting agreement. This Court has held that attempts to evade the FLSA's overtime requirements by elevating form over substance are impermissible. See, *e.g.*, *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, 430-431 (1945) (overtime pay must be based on a regular rate that takes into account incentive pay); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (overtime pay must be based on a regular rate that takes into account payments resulting from guaranteed piece rates); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 39-41 (1944) ("split-day plan" under which daily work hours are classified as either "regular" or "overtime" in order to perpetuate the pre-statutory wage scale violates FLSA). See also 29 C.F.R. Pt. 778, Subpt. F (Pay Plans Which Circumvent the Act); 29 C.F.R. 553.224 (state or local government cannot change the length and starting time of work periods in order to evade the FLSA's overtime requirements); 6A Wage & Hour Man. (BNA) 99:5254 (Feb. 15, 1991) (although employer may use compensatory time provisions in conjunction with a time-off plan within a biweekly pay period, it may not pay a fixed salary for such fluctuating hours); H.R. Rep. No. 331, *supra*, at 22 ("The Committee expects good faith compliance by public employers and would direct the Secretary of Labor to enforce these amendments so as to prevent * * * attempts to evade Congressional intent.").

disrupt the employer's operations. 43 F.3d at 1180.[11] Here, the Fifth Circuit expressly disagreed with *Heaton*, Pet. App. 10a-11a, and held that a public employer may require employees to use accrued compensatory time unless the parties expressly agree to the contrary. *Id.* at 11a-13a; accord *Collins* v. *Lobdell*, *supra*.

Whether a public employer may force employees to use accrued compensatory time absent an agreement on the issue is an important question. As the court of appeals recognized in this case, public employers have an incentive to limit the accrual of compensatory time to avoid paying cash overtime, but their employees often want to accumulate compensatory time, either to reach the statutory maximum (at which point they would have to receive overtime pay for any overtime work) or to have the time available for later use. Pet. App. 8a. Public employers therefore may often attempt to require employees to use compensatory time without an agreement. Indeed, they have done so on a number of occasions. See Pet. App. 29a-30a; *Heaton* v. *Moore*, *supra*; *Collins* v. *Lobdell*, *supra*; *Rogers* v. *City of Virginia Beach*, No. 98-2253, 1999 WL 498707 (4th Cir. July 15, 1999); *Hellmers* v. *Town of Vestal*, 969 F. Supp. 837, 846-847 (N.D.N.Y. 1997); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 Berkeley J. Emp. & Lab. L. 74, 111-113 (1999); cf. *Banks* v. *City of Springfield*, 959 F. Supp. 972, 979-980 (C.D. Ill. 1997)

[11] The Eighth Circuit took no position on whether the parties may agree to "limit the time and manner of the employees' use of compensatory time." 43 F.3d at 1180 n.4.

(rejecting allegation of forced use of compensatory time).[12]

Contrary to the belief of the court of appeals (Pet. App. 11a-12a), the conflict between its decision and *Heaton* is "a substantial concern" even though the court of appeals would allow an employee to obtain the employer's agreement that it will not force the employee to use compensatory time. *Ibid.* Possible agreements on compensatory time that may be entered into in the future cannot mitigate the impact of the Fifth Circuit's decision in this case and the Ninth Circuit's decision in *Collins* v. *Lobdell* on public employees who have accrued compensatory time but do not currently have agreements prohibiting forced use of that time. Employees governed by the *Heaton* rule have a remedy under the FLSA for forced-use policies that are or have been applied, but those governed by the decisions in this case and *Collins* v. *Lobdell* do not.

Moreover, employees who are subject to the decisions in this case and *Collins* v. *Lobdell* and who do not have a recognized representative have little leverage to displace the background rule fashioned by the court. They must negotiate individual agreements or under-

[12] Because the agreements on compensatory time between petitioners and respondent Harris County are not in the record, we do not know if any of those agreements specifically allows respondents to control any employee's use of compensatory time. See Pet. App. 12a. We assume that respondents would have informed the Court if any of the agreements contained such a provision. See Sup. Ct. R. 15.2. Of course, as described above, agreements giving respondents control over an employee's use of compensatory time would be permissible only if the cession of control to the employer is sufficiently circumscribed that it is consistent with Section 207(*o*). See 29 C.F.R. 553.23(a)(2); note 6, *supra*.

standings, 29 U.S.C. 207(*o*)(2)(A)(ii), and those agreements "may take the form of an express condition of employment" imposed by the employer. See 29 C.F.R. 553.23(c)(1); S. Rep. No. 159, *supra*, at 11; H.R. Rep. No. 331, *supra*, at 20. Although an employee's acceptance of such terms and conditions must be voluntary and uncoerced, 29 C.F.R. 553.23(c)(1), in practice an employee who needs a job will likely assent to what the employer is willing to offer. See also *ibid.* (the agreement or understanding "may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay"); 29 U.S.C. 207(*o*)(2) (for employees hired before April 15, 1986, "the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding"). Approximately 57% of employees subject to Section 207(*o*) do not have a recognized collective bargaining representative. See David J. Walsh, *supra*, 20 Berkeley J. Emp. & Lab. L. at 124. Thus, the Fifth Circuit's rule will likely result in large numbers of employees accepting restrictions on when and how they may use accrued compensatory time, whether they like those restrictions or not.[13]

[13] Even employees who have a collective bargaining representative (as in *Collins* v. *Lobdell*) are likely to be adversely affected by the court's rule, because they may have to make concessions to the employer on other issues subject to collective bargaining in order to obtain the employer's agreement not to require them to use compensatory time against their will.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

HENRY L. SOLANO
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Attorney
Department of Labor

SEPTEMBER 1999

No. 98-1167

In The Supreme Court of the United States

EDWARD CHRISTENSEN, et al.,
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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** Counsel of Record*

PETITION FOR CERTIORARI FILED JANUARY 19, 1999
CERTIORARI GRANTED OCTOBER 12, 1999

CERTIORARI GRANTED OCTOBER 12, 1999
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The Following opinions, decisions, judgements, orders, and stipulations have been omitted in printing this joint appendix because they appear on the following pages in the appendices to the printed Petition for Writ of Certiorari and Brief in Opposition.

***From Petitioners' Appendix to Petition for Writ of Certiorari*:**

RELEVANT DOCKET ENTRIES

SUMMARY OF THE DOCKET IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 97-20796

DATE	PROCEEDINGS
10/01/97	Notice of Appeal
02/02/98	Briefing Completed
05/04/98	Oral Argument
10/19/98	Opinion Filed
10/19/98	Judgment Entered
11/10/98	Mandate Issued
11/10/98	Record Returned to USDC
01/26/99	Notice of Petition for Certiorari
10/18/99	Order Granting Certiorari
10/21/99	Cert. Record to United States Supreme Court

SUMMARY OF THE DOCKET OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION NO. H-94-1427

DATE	DOCKET ENTRY	PROCEEDINGS
04/28/94	#1	Complaint
08/08/94	#6	Answer
04/19/95	#16	Second Amended Complaint
10/10/95	#24	Stipulation (Also Pet. App. D)
10/20/95	#26	Plaintiffs' Motion for Summary Judgment
10/27/95	#27	Cross Motion for Summary Judgment
10/27/95	#28	First Amended Answer
11/25/96	#29	Opinion on Summary Judgment (Also Pet. App. B)
11/25/96	#30	Interlocutory Declaratory Judgment
06/20/97	#33-34	Attorney Fees Rulings
07/25/97	#35	Final Judgment (Also Pet. App. C)
08/22/97	#36	Notice of Appeal

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

Mr. Michael Tarcissius Leibig
Zwerdling, Paul, et al.
4012 Williamsburg Court
Fairfax, VA 22032

Re: Edward Christensen, et al. v. Harris County, et al.
No. 98-1167

Dear Mr. Leibig:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted limited to the following question: Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

Sincerely,

William K. Suter, Clerk

DEC 3 1999

No. 98-1167

In The Supreme Court of the United States

EDWARD CHRISTENSEN, et al.,
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

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* *Counsel of Record*

PETITION FOR CERTIORARI FILED JANUARY 19, 1999
CERTIORARI GRANTED OCTOBER 12, 1999

61pp

QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time?

PARTIES TO THE PROCEEDING BELOW

I.

PLAINTIFFS/APPELLANTS/PETITIONERS

The following members of the Harris County Sheriff's Department are parties to the petition. For convenience, they are referred to as "the Deputies[1]".

1. Edward A. Christensen
2. Kenneth O. Adams
3. David W. Addison
4. Jose A. Alvarado
5. Robert Amboree
6. Bobby G. Andrews
7. Randy Anderwald
8. Gary R. Ashford
9. Craig L. Bailey
10. Richard Bailey
11. Ricardo E. Baldoras
12. Herbert V. Barnard
13. Gerald Barnett
14. Paulette M. Barnett
15. Bridgett Blackman
16. Aynl E. Blackwell
17. Gary F. Blahuta
18. Scott P. Blakenburg
19. Deborah Bliess
20. Bruce H. Breckenridge
21. J.T. Brooks
22. Brian Buchannan
23. Patricia M. Bui
24. Don E. Bynum
25. Clarence A. Callis
26. William M. Campbell
27. Heather Carr
28. Thomas J. Carr
29. Paul E. Carpenter
30. Robert Casey
31. Mark E. Cervel
32. Eladio C. Chavez
33. Roy Clark
34. Denny P. Coker
35. Alford A. Cook
36. Gregory P. Cox
37. Donald D. Crayton
38. Richard D. Crook
39. David D. Davis
40. Gary W. Davis
41. Christopher E. Denny
42. Russell Duckes

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[1] Lynwood Moreau, the initial lead Plaintiff, asserted individual claims which are not before this Court because he has withdrawn. *See*, Order granting Moreau's Motion to Withdraw Authorization of Counsel to Represent Him. (Docket #37-39) November 20, 1997.

43. Larry A. Eickhoff
44. Frank Fairly
45. David W. Finley
46. James P. Fitzgerald
47. Ernie R. Fowler
48. Michael R. Garcia
49. Thomas M. Gentry
50. John Goldejohn
51. Robert M. Goerlitz
52. David Gonzales
53. Raul Gonzales
54. Miguel A. Gonzales
55. Billy Gray
56. William L. Gray
57. Lawrence P. Gries
58. Thomas P. Gurrey
59. Preston R. Halfin
60. Sammy Head
61. Neal Hines
62. Larry A. Howell
63. Marshall P. Isom
64. James A. Johnson
65. Derry L. Jones
66. David E. Kaup
67. William C. Kinisell
68. Howard J. Kimile
69. Steve Kirls
70. Edgar Knighton
71. Freddy G. Lafurente
72. Michael G. Lagrove
73. Al Lanford
74. Vernon S. Lemons
75. Shemei B. Levi
76. Jeanne Long
77. Timothy Loyd
78. Joe S. Magallou
79. David B. Martin
80. Pedro Martinez
81. Russell L. Mayfield
82. Terry McGregor
83. Robert C. Meaux
84. Stephen Melinder
85. Marty M. Mirgo
86. D.D. Montgomery
87. Jose L. Merin
88. Richard O. Newby
89. Arthur W. Nolley
90. William R. Norwood
91. Richard C. Nummery
92. Karen D. O'Bannon
93. Raymond E. O'Bannon
94. Guadalupe Palafox
95. Wayne Parinella
96. Deborah Petruska
97. James A. Phillips
98. Simon C. Ramirez
99. Michael B. Rankin
100. James C. Reynolds
101. Willard G. Rogers
102. Gerald M. Robinson
103. Joe Ruffino
104. Lance J. Scott
105. Rob A. Self
106. Donald Shaver
107. James K. Shirley
108. James Smedick

109. Gina K. Spriggs-Graham[2]
110. Jeffrey M. Stauber
111. Larry L. Strickland
112. Billy J. Taylor
113. Kerry Townsend
114. Richard S. Trinski
115. Gordon Trott
116. Ed Trott
117. Richard P. Valdez
118. Dalton E. Van Slyke
119. Frank L. Vernagallo
120. Ruben Villarreal
121. Johnny F. Walling
122. Gerald R. Warren
123. James M. Watson
124. Thomas G. Welch
125. John A. Wheler
126. Joseph L. Williams
127. Rwanda Wiltz

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[2] In an earlier pleading Deputy Gina K. Spriggs-Graham was identified twice as petitioner #109 and #110.

II.

DEFENDANTS/APPELLEES/RESPONDENTS

Harris County, Texas

Tommy B. Thomas, Sheriff, Harris County, Texas[3]

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[3] Johnny Klevenhagen, former Sheriff of Harris County, was not a party to the appeal from the judgment of the Trial Court.

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TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

No. 98-1167

EDWARD A. CHRISTENSEN, *et al.*,
Petitioners,
v.
HARRIS COUNTY, TEXAS, *et al.*,
Respondents.

PETITIONERS' BRIEF

Edward Christensen and 126 other individually named Harris County Deputy Sheriffs, Plaintiffs in the District Court and the Appellees in the Court of Appeals, request the Court to overturn the judgment of the United States Court of Appeals for the Fifth Circuit in *Lynwood Moreau, et al., v. Harris County, Texas, et al.*, Fifth Circuit No. 97-20796 (October 19, 1998), and remand the case for a decision consistent with the United States Department of Labor's interpretation of 29 U.S.C. § 207(o) that a public agency, absent a preexisting agreement, may not compel employees to use accrued compensatory time.

OPINIONS BELOW

The Court of Appeals opinion is reported at 158 F.3d 241 (5th Cir. 1998) and is reproduced as Appendix A (Pet. App. 1a-23a) in the separately bound Appendix to the *certiorari* petition (hereafter "Pet. App.").

The District Court's opinion on Summary Judgment was issued on November 25, 1996, reported at 945 F.Supp. 1067 (S.D. Tex. 1996), and is reproduced as Appendix B. (Pet. App. 24a-27a). The District Court's final order is unreported and is reproduced as Appendix C. (Pet. App. 28a).

JURISDICTIONAL STATEMENT

The Court of Appeal's Opinion and Judgment were entered on October 19, 1998. The judgment is reproduced as Appendix D. (Pet. App. 29a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petition for rehearing or hearing *en banc* was filed.

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of the 1985 Amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA"), codified in 29 U.S.C. § 207(o) and the relevant implementing regulation thereto, codified in 29 C.F.R. §§ 553.20-553.28.

The 1985 FLSA Amendment Act's §207(o) provision is reproduced in Appendix E. (Pet. App. 32a-38a).

The implementing regulations to the FLSA, promulgated by the Secretary of Labor are reproduced in Appendix F. (Pet. App. 39a-59a).

The Department of Labor's interpretation of those regulations is set forth in DOL Letter Rulings of September 14, 1992, available in 1992 WL 845100; April 1, 1994, available in 1994 WL 1004765; and August 19, 1994, available in Thompson, Fair Labor Standards Handbook at 212; and in the Solicitor General's "Brief for the United States as *Amicus Curiae*" on petition for *certiorari* in this case.

STATEMENT OF THE CASE

A. The Fifth Circuit Decision and DOL's Rules.

This case presents the question of whether under the 1985 Amendments Act to the Fair Labor Standards Act, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20 to 553.28, and the Secretary of Labor's reasonable and considered interpretations and rulings thereon, a local government which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employees permitting mandatory time off, compel employees to burn off their accumulated compensatory time bank involuntarily, that is, when they do not request to do so.

The Fifth Circuit below answered this question in the affirmative, expressly disagreeing with the Eighth Circuit holding in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir.

1994) *cert. denied, Schriro v. Heaton*, 515 U.S. 1104 (1995), that FLSA compensatory time banks belong to employees and are not subject to unilateral employer compelled use.

The Fifth Circuit's decision is based on direct statutory analysis, without attention to the related regulations and Department of Labor interpretations. The Fifth Circuit majority created a "default rule" that the employer may set whatever workplace rules it wishes in the absence of a negotiated agreement to the contrary. (Pet. App. 13a). And so, the Fifth Circuit allowed employer compelled use of accrued compensatory time, thereby decreasing the real value of banked compensatory time, even in the face of the FLSA overtime standard and the statute's own default rule that, in the absence of free employee agreement, overtime must be paid in cash at premium rates. Judge Dennis dissented, objecting to the Fifth Circuit's lack of recognition of the relevant regulations, on grounds of this Court's rule in *Auer v. Robbins*, 519 U.S. 452 (1997) -- that is, it is the Secretary of Labor, and not the courts, that is charged with the issuance of regulations under the 1985 Amendment Act P.L. 99-150, 56 (1985). Because the rules controlling FLSA compensatory time are "a creature of the Secretary's own regulations", her interpretation of those rules "is, under our jurisprudence, controlling, unless plainly erroneous or inconsistent with the regulations." The DOL's rule follows the statute's guidance mandating

overtime in cash absent a bilateral agreement consistent with §207(o), and prohibits compelled use absent an express employee authorization by agreement which is both freely arrived at and consistent with the requirements of §207(o). (Pet. App. 14a-23a).

B. The History of Comp Time and §207(o)'s Enactment.

For forty-eight years compensatory time in lieu of cash payment for labor was anathema to the FLSA. For more than fifty years, timely cash payment for hours of work has been a fundamental premise of the Act. This is so because broadly used, liberally accessed, employer mandated compensatory time off in lieu of cash undermines the effectiveness of the national FLSA overtime standard. The core purpose of the Act's premium pay for overtime is not the provision of an employee benefit; instead, it is intended as a market disincentive to an employer so managing the work place to create fewer jobs with hours in excess of the forty hour per week standard rather than more jobs with hours within the standard. See *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941). Compensation systems which provide for payment for hours of work other than in cash avoid this disincentive and undermine the effectiveness of the national hours of work standard. This is particularly so when an employer establishes a practice of moving compensation liability from one pay period to another through mandatory time off as a substitute for cash overtime. A mandatory time off system

strikes at the FLSA overtime standard forcefully three times. First, the employer adjusts work schedules to get the job with fewer workers working more than 40 hours per week; strike one. Then, the employer avoids contemporaneous premium pay cash liability; thus, strike two, defeating the cost of the time and one half incentive to spread the work among less expensive straight time workers. Finally, the employer compels the use of accrued comp time at his convenience, relieving the incentive to keep the standard work week at 40 hours; strike three.

In constructing the FLSA between 1936 and 1938, Senator Hugo Black, later Justice Black, and his New Deal colleagues, were insistent that pay be required in cash on the basis of a forty hour work week standard. The standard arose, in part, as a reform of the employment practices common in Senator Black's Alabama in the 1920's and 1930's, a period of job scarcity during which some of the Senator's constituents were often paid in script redeemable only at the employer's stores, rather than in cash, and were required to work very long work hours on days in which the company had extra work and go home on days in which work was slow. This employment system operated absent a national hours of work standard. It allowed industry to concentrate its work at low wages spread among fewer

workers than would be the case under a standard forty hour work week with overtime at time and one-half.[4]

The aim of the FLSA premium pay/hours of work standard was to create a market incentive to shorten the work week to the national standard and spread work. The use of employer mandated time off as overtime compensation in lieu of cash alleviates the market force of that incentive and, thereby, lessens its effectiveness. Thus, the Act outlawed mandatory time off as a substitute for cash pay at a time and one half premium for overtime.

As originally enacted in 1938, the FLSA applied only to private employers. Beginning in 1966, Congress expanded the coverage to protect state and local government employees which resulted in a now settled question of the authority of the Congress to do so. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v.*

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[4] *See* the history of enactment of the FLSA in Roediger and Foner, *Our Own Time: A History of American Labor and the Working Day* (Greenwood Press, 1989); Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988); Rosensweig, *Eight Hours for What We Will: Workers and Leisure in an Industrial City 1870-1920* (Cambridge University Press, 1983); Steinberg, *Wages and Hours: Labor Reform in the Twentieth Century* (Rutgers University Press, 1982); Cahill, *Shorter Hours: A Study Since the Civil War* (Columbia University Press, 1932); Nodland, "A Brief History of the FLSA," 39 *Labor Law Journal* 715-28 (November 1988); Hunnicutt, "Monsignor Ryan and the Shorter Hours of Labor," 69 *Catholic Historical Review* 384-401 (July 1983); and Eggert, "Fight for the Eight Hour Day," *American History Illustrated*, 36-44 (May 1972).

San Antonio Metropolitan Transit Auth., 469 U.S. 328 (1985). That dispute was resolved in 1985 by *Garcia* with a recognition that under the federalism of the 10th Amendment, Congress, and not the judiciary, is the proper institution to protect and give full consideration to federalism and the special attributes of state and local government, including particularly the special character of the public employer-public employee relationship.

In a direct response to these concerns, Congress amended the FLSA insofar as that Act applies to the public sector shortly after this Court's decision in *Garcia*. (P.L. 99-150; 99 Stat. 790). Congress enacted the 1985 Amendments Act after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs with a national hours of work standard which would include the public sector.[5]

After the *Garcia* decision, many public employers and their organizations sought Congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In hearings held by House and Senate committees, public employees made the contrary arguments that compliance with *Garcia* would not be excessively costly, that it was only fair for public employees to enjoy the same standards

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[5] *See, Hearings on the Fair Labor Standards Act*, H. Hrg. 99-67, 99th Cong. 1st Sess. (Sept. 24, 1985); and S. Hrg. 99-359, 99th Cong. 1st Sess. (July 25, August 28, and Sept. 10, 1985).

as virtually all private employees, and that with the expansion of public employment to a much larger portion of the work force national wage and hours standards would be diluted were such a significant portion of American workers exempted.[6]

At the invitation of Congressional leaders, the public-employer and public-employee groups met and proposed legislation which was the product of intense negotiation between all the affected parties and a resulting extensive compromise.[7] With board support, including organizational support representing both the Deputies and

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[6] In the end, public employers and public employee representatives agreed in their testimony before Congress that use of compensatory time in lieu of overtime pay, if pursuant to equitable arrangements, could be mutually beneficial. *See*, e.g., House Hearings, 99th Cong., 1st Sess. 155 (1985) (G. Brazgel, IUPA Reg. Dir., representing the union of Deputies in their case) ("Comp time is vital to policing. Not only is it an important benefit to on the job police officers, but it also is an important tool of sound police management.")

[7] *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles)(the final Senate bill is different from the bill I originally introduced and represents a compromise among the effective parties); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 Amendments). The compromise bill was supported by the National Association of Counties [of which Harris County is a member], the National Public Employer Labor Relations Association [in which Harris County participated], the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, the International Union of Police Association [of which the Deputies are members], the AFL-CIO [in which the Deputies are members], and other major public employer associations and public employees unions and associations.

the County in this litigation, the 1985 FLSA Amendments were quickly and unanimously enacted by Congress. (App. H, I, and J, Pet. App. 61a *et seq.*).

In reporting the 1985 Amendments Act, the Education and Labor Committee of the House of Representatives stated:

> The Committee is very concerned that public employees in office with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation.[8]

Among the provisions in the resulting statute, FLSA §207(o) compensatory authorization accommodates the

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[8] *See* House Report No. 99-331, 99th Cong. 1st Sess. 10 (1985).

preexisting practice among state and local employers and the need and expressed preference for work place flexibility among their employees. The new public sector compensatory rule provided that, pursuant to strict conditions, including employee agreement freely given, a public employer may pay FLSA premium compensation for overtime in compensatory time off in lieu of cash. The provision is an exception to the general requirement that all overtime must by paid in cash. Compensatory time under the Act may be used only by qualifying public employees and only under strict conditions designed to prevent employer manipulation of the employee's right to time and one half remuneration for overtime. A public employer is permitted to deviate from the basic rule that employers are required to pay their employees in cash for all overtime work only pursuant to a compensatory time system which meets the standards of §207(o). As an exception to the more general prohibition on the use of compensatory time off as compensation §207(o) was designed to be narrowly construed under strictly enforced conditions. *See Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941); *Phillips v. Wallace*, 324 U.S. 490, 493 (1945); *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1947). In addition as the Eighth Circuit wrote in *Heaton*, the maxim of statutory construction *inclusio unius est exclusio alteris* is particularly appropriate when the statutory language being interpreted is an exception to a general rule.

"When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871).

C. The DOL's Final Comp Time Rules.

Congress mandated the issuance of regulations necessary to implement the 1985 amendments after an open regulatory comment period. P.L. 99-150, § 6 (1985). The Department of Labor, in turn, conducted an extensive rule making and solicited and carefully considered the views of state and local governments and of public employees. *See* 52 Fed. Reg. 2012-15 (1987). Again public employers and employee representatives, including organizational representatives of Harris County and the Deputies in this case, contributed. *See*, 51 Fed. Reg. 25710 (July 16, 1986) and 52 Fed. Reg. 2012 (January 16, 1987). Appendix C (Pet. App. 61e et seq.)

The Department of Labor's final regulations and discussion of the major comments received during the related comment period were published in January 1987.[9] The final rule clarified the nature of accrued FLSA public sector compensatory time as a "bank" which is "preserved and used," and of which a record is kept. The DOL's response to comments emphasized employee flexibility; an accrued account to be administered with an element of employee choice and with the voluntary, knowing and

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[9] *See* Exhibit 1 at the end of this brief for a section-by-section review of 29 C.F.R. §§553.20-28.

willing agreement of the employee, absent any element of employer coercion.[10] The employee's compensatory bank may not be used to avoid the cost of overtime at premium rates and its use may not be controlled by the scheduling convenience or inconvenience of the employer.[11] *See* App. G Pet. App. 61a.

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[10] *See* Exhibit 2 at the end of this brief for a detailed review of the regulatory comments.

[11] In 1995, in its commentary on its final rule on the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2206-07 (January 6, 1995), the Department of Labor referenced the interplay of comp time with the FMLA and revisited the special nature of FLSA comp time, as follows:

> The use of compensatory time off is severely restricted under the [FLSA] in ways that are incompatible with FMLA's substitution provisions. First, "comp" time is not a form of accrued paid leave mentioned in the FMLA or legislative history for purposes of substitution. It is also not a benefit provided by the employer. Rather, it is an alternative form for paying public employees (only) for overtime hours worked. **The public employee's "comp time bank" is not the property of the employer to control, but rather belongs to the employee.** If a public employee terminates employment, any unused comp time must be "cashed out." Thus, FMLA's provisions allowing an employer to unilaterally require substitution would conflict with FLSA's rule on public employees' use of comp time only pursuant to an agreement or understanding between the employer and the employee (or the employee's representative) reached before the performance of the work. ... 60 Fed. Reg. 2180, 2206-07 (January 6, 1995).

The 1985 Amendments and their regulations dramatically changed, for public agencies and no one else, the rules regarding compensatory time off. It created an exception to the Act's general prohibition of compensatory time in lieu of cash so long as the compensatory time system is in the public sector and so long as it is provided under a collective bargaining agreement, employment agreement, or a memorandum of understanding. (29 U.S.C. § 207(o), App. F, Pet. App. 33a-39a). Any such agreements in jurisdictions, like Harris County, Texas, without authorized collective bargaining, may be directly with the employees, see *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), and must meet the following conditions set forth in House Report 99-331, 99th Cong. 1st Sess. 10 (1985) --

> The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) **the employee knowingly agrees** to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be **preserved**, used, or cashed out consistent with the provision of this new subsection [§ 207(o)]. The agreement or understanding may include other provisions governing the preservation, use or cashing out of compensatory time **so long as those provisions are consistent with this subsection of the Act.** (bracketed material supplied)(emphasis added).

Even if a condition of employment is involved the employee's decision to accept compensatory time must be made "freely and without coercion or pressure." 29 C.F.R.

§ 553.23(c); and *Moreau v. Klevenhagen*, 508 U.S. 22 (1993). The agreement with the employee must be arrived at before the work is done. 29 C.F.R. § 553.23(a).

FLSA compensatory time must be paid, like cash overtime, at premium rates of time and one half, that is 90 minutes for each 60 minutes worked. 29 U.S.C. § 207(o)(1); 29 C.F.R. §§ 533.20 and 553.22. Employees such as the Deputies in this case may accumulate up to 480 hours of compensatory time. 29 U.S.C. § 207(o)(3); and 29 C.F.R. § 553.25. However, in this case, Harris County has set the limit at 240 hours. Requests by an employee to use accrued compensatory time must be granted if made within a reasonable time and if granting the request does not "unduly disrupt" the operations of the agency. 29 U.S.C. § 207(o)(5) and 29 C.F.R. § 553.25. Undue disruption of operations, and not budgetary considerations, is the **only** allowable reason for denying compensatory time. Undue disruption is more than inconvenience to the employer and the fact that an employer must pay a substitute overtime at premium rates is not a legitimate reason for denying access. DOL Letter Ruling, August 19, 1994, available in Thompson, Fair Labor Standards Handbook at 212.

An employer may freely substitute cash payment, in whole or in part, for compensatory time off. 29 C.F.R. § 553.26. However, compensatory time is not to be used as a means of avoiding overtime compensation. Therefore, more compensatory time may not be used than an employer can realistically, and in good faith, expect to be able to grant to the employees. 29 C.F.R. § 553.25(b). **Public employers may, of course, choose not to enter non-coercive bilateral compensatory time agreements with their employees. However, if they choose that option,**

the default rule is that they must pay their employees in cash for overtime or add employees to eliminate the need for overtime.

D. Compensatory Time Under §207(o) in Harris County.

And so, on November 13, 1985, the Fair Labor Standards Amendments Act of 1985, P.L. 99-150; 99 Stat. 790 was enacted containing §207(o) authorizing the substitution of compensatory time for cash overtime in the public sector. It became effective in April 1986. The final regulations were published in the Federal Register on January 16, 1987. (App. F, 40a-59; App. J 79a-97a).

Over the ensuing eighteen months, following the enactment of §207(o), the Harris County Sheriffs Department implemented unilaterally a compensatory time system over the expressed objection of the Deputies, led by the Harris County Deputies Union. After a series of these objections, both formal and informal, indicating refusal to freely accept compensatory time as unilaterally imposed, in April 1988, approximately 400 objecting Deputies filed suit against the County and the Sheriff insisting that the compensatory time system so imposed violated the requirement of §207(o)(2) that any compensatory time system must be the result of an agreement between the employees affected and their designated representative. The County responded that in jurisdictions in which collective bargaining agreements are not authorized by local law, the relevant comp time agreement may be a condition of employment imposed on individual employees through their acceptance of employment under the County's personnel regulations. Each Harris County Deputy had signed a brief, boiler-plate payroll compensation form that stated that the Deputy understood and accepted the

County's personnel regulations. Basic terms of the County's pay system were set forth in the personnel regulations, including a provision for compensatory time **but not including a provision allowing employer compelled use of accrued compensatory time banks.**[12]

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[12] Currently Harris County Personnel Regulation 8.02 provides:

8.02 OVERTIME FOR NON-EXEMPT EMPLOYEES

8.021 Based on available budgeted funds allocated for overtime compensation, non-exempt employees are compensated for hours of actual work or physical work in accordance with applicable federal and state statutes, rules and regulations regarding overtime compensation. In lieu of cash payment for overtime work, compensatory time may be allowed.

8.022 All compensatory time accrued by a non-exempt employee is calculated at the rate of one and one-half (1 ½) times per hour if the employee actually works more than 40 hours during the work week.

8.023 The compensatory time balance must not exceed a 240-hour maximum, is carried forward indefinitely, and may be used by the non-exempt employee at any time approved by the employee's supervisor.

8.024 Upon termination of employment, a non-exempt employee receives full pay for any compensatory time balance in accordance with applicable state and federal law.

8.025 No employee may "buy back" compensatory time after s/he receives cash payment or uses compensatory time.

Harris County Personnel Regulations, effective June 8, 1996, adopted and approved by the Commissioners' Court of Harris County, Texas, May 14, 1996. The provision re-adopted Rule 8.02 as it had appeared in the regulations at least since 1992. No where in the personnel regulation is there any mention of compelled use of compensatory time or other express provisions on the "preservation, use or cashing out" of compensatory time beyond the language set forth

(continued...)

On May 3, 1993, this Court ruled in *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), in conformance with the controlling Department of Labor rule that where collective bargaining is not authorized by local laws, §207(o) agreements may indeed be with individual employees.

In the interim, the County and the Sheriffs Department continued to develop and implement compensatory time practices. By the summer of 1992, a number of Harris County Deputies had earned compensatory time banks of sufficient total hours to raise a concern within the County's administration. Then Assistant County Attorney Rosalinda Garcia wrote to the federal Wage and Hour Administrator that the County "must comply with certain legal requirements to have cash reserves available to pay outstanding obligations, such as compensatory time. Therefore, county officials are looking for ways to decrease this liability." Ltr. Harris County Attorney's Off. To DOL Wage and Hour Division, July 10, 1992. Accordingly, on July 10, 1992, the County requested a Letter Ruling from the Department of Labor, as follows:

> While it is clear that the Sheriff must authorize an employee to use compensatory time within a reasonable time after it is requested, neither the Federal Fair Labor Standards Act nor the regulations promulgated thereunder appear to expressly address whether the Sheriff may schedule non-exempt employees to use or take compensatory time. Would such scheduling violate the FLSA? Ltr. Harris County Att. to DOL, July 10, 1992.

The Department of Labor responded in a Letter Opinion of September 14, 1992, that --

> ...[I]t is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed, **if** the prior agreement **specifically** provides such a provision, and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure. See §553.23(c). Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to **require** an employee to use accrued compensatory time. However, as indication in §553.27, accrued compensatory time may be paid in cash at any time. It appears that "cashing out" accrued compensatory time could achieve the objective of concern. (emphasis in original)
> DOL Letter Ruling, September 14,1992; 1992 WL 845100.

Despite the DOL Letter Ruling, during 1993 the Harris County Sheriffs Department unilaterally developed and implemented a practice of the compelled use of compensatory time. The Deputies strongly objected. On April 28, 1994, Petitioners ("Deputies"), consisting of 129 Deputy Sheriffs employed by Respondents ("County"), initiated this action in the United States District Court for

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[12](...continued)
above. The Rule does contain provisions that compensatory time is "carried forward indefinitely," "may be used at any time approved by the employee's supervisor," and deference to "applicable federal and state statutes, rules and regulations."

the Southern District of Texas. In their action, the Deputies contended that the County engaged in two practices which contravened the provisions of §7(o) of the FLSA and the Secretary of Labor's implementing regulations to that statute. In particular, the County failed and refused to grant the Deputies the use of their accumulated compensatory time when they reasonably requested it absent "undue disruption." See, DOL Letter ruling August 19,1994 (declaring such a practice to be in violation of §207(o)). In addition, the County unilaterally forced them to use their accumulated compensatory time off when they did not request its use.

The Trial Court, after examining the Deputies claims required the parties to submit a stipulated set of facts addressing the County's practice of compelling Deputies to use their accumulated compensatory time when they did not request it. (Pet. App. 30a-32a). Correspondingly the Trial Court directed the parties to file cross motions for summary judgment based upon their stipulation of facts.

In response to the Trial Court's directive, the parties stipulated to the facts set forth in the following paragraph:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who, for purposes of the Fair Labor Standards Act are considered non-exempt will be maintained below predetermined maximum levels. Pursuant to this policy, each Bureau Commander

> determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that the employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to reduce the accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce the accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employer and supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision with the department on an informal basis. (Pet. App. 30a-32a).

Based upon these stipulations, the parties filed their cross motions for summary judgment. On November 25, 1996, the Trial Court, addressing these motions, entered an opinion on summary judgment, holding that the County's

practice of forcing employees to use their accumulated compensatory time when they did not request it violated the provisions of §7(o) of the FLSA, 29 U.S.C. § 207(o). *Moreau v. Harris County*, 945 F. Supp. 1067 (S.D. Tex. 1996). (Pet. App. 24a-27a). Relying on the decision of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied, sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995), the Trial Court found thus:

> Public employers may pay their employees for overtime by awarding time off at the rate of one and one-half hours for each hour, 29 U.S.C. § 207(o)(1992). Governments are allowed to substitute time off for cash as compensation; but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker's terms. *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995). Federal law limits maximum accrued time to 240 or 480 hours depending on the type of work an employee does. Employees must be paid cash for additional hours. The workers in this case have not yet accrued 240 hours. The function of the county limits is to force workers to take time off rather than to keep working and receive cash for overtime.

945 F.Supp. 1067. (Pet. B 25a).

On July 28, 1997, the Trial Court entered a final judgment proscribing the County's practice of unilaterally forcing petitioners to consume their accumulated compensatory time. (Pet. App. 28a).

The County appealed this judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed. *Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998). (Pet. App. A 1a-23a). The Fifth Circuit's Judgment was entered on October 19, 1998.

On January 19, 1999, the Deputies, complaining of this decision and judgment, requested that this Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit to review that Court's holding and resolve the issues surrounding the preservation of FLSA compensatory time consistently with the applicable rules and interpretations of the Department of Labor.

This Court invited the Solicitor General to express the view of the United States on the petition. In September, 1999, the Solicitor expressed the view that --

> The Department of Labor accordingly has construed Section 207(o) not to authorize a public employer, in the absence of an agreement, unilaterally to require an employee to use accrued compensatory time. The terms of Section 207 reflect the general principle that the employee controls the use of his or her accrued compensatory time, absent an agreement to the contrary. Section 207(o) identifies only one circumstance in which an employer may unilaterally control an employee's use of accrued compensatory time -- when the employee has

requested use of accrued time and that use would "unduly disrupt" the employer's operations. 29 U.S.C. §207(o)(5). If Congress had intended that the employer could impose other limitations on the use of compensatory time, it presumably would have so provided. See *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, however, the court of appeals held that an employer not only may narrow the range of circumstances in which an employee may use accrued compensatory time, but also may affirmatively require the employee to use compensatory time even if the employee would prefer not to do so. Reading into Section 207(o) such additional employer rights unilaterally to control the preservation and use of compensatory time would be inconsistent with the function of compensatory time as substitute compensation and would impermissibly "enlarge[] by implication" the exception provided by Section 207(o). (Citations omitted). Brief of the United States as *Amicus Curiae* at 11-12 (September 1999).

This Court granted *certiorari* on October 12, 1999.

SUMMARY OF ARGUMENT

There is no §207(o) agreement in place in the Harris County Sheriffs Department which provides for the compelled use practice outlined in the record stipulation. Nor would there be; the Deputies in this case would not freely accept the practice of employer compelled

consumption of their compensatory time banks. It obviously devalues their accrued comp time.[13]

A public agency may not compel its employees to use accrued compensatory time under 29 U.S.C § 207 (o) of the Federal Fair Labor Standards Act, absent a freely accepted agreement with its employees permitting it to do so where the agreement complies with §207(o) in all other respects. At its core, this is so because under the statute accrued compensatory time "belongs to the employee" and is devalued by unilaterally compelled use. The statute establishes that the "default rule" is where no agreement exists cash overtime must be paid. The only reasonable application of that rule is that where an employer is allowed to substitute comp time for cash overtime pursuant to such an agreement, the employer may not then compel the use of accrued comp time without an employee's express authorization by bilateral agreement.

However, the statute is silent on the precise compelled use question raised here. In such circumstances,

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[13] Which is not to say that a compensatory time system similar to that described in the stipulation would not be permissible when incorporated in a bilateral compensatory time agreement containing (a) strong protection of the Deputies' right to use their accrued compensatory time liberally and on demand, or when such use would unduly disrupt operations (as "unduly disrupt" is defined in the Department of Labor's August 19, 1994 Letter Ruling) to cash comp time banks out on demand, and (b) a clear provision that any interpretation or application of the agreement which is inconsistent with the Department of Labor's interpretation of its regulations under §207(o) would be superseded.

the question is controlled by the interpretation of the federal Department of Labor of its own relevant regulations under 29 C.F.R. §§553.20-553.28, *Auer v. Robbins*, 519 U.S. 452 (1997) and *Moreau v. Klevenhagen*, 508 U.S. 22 (1993). The Department of Labor's reasonable interpretation of its own compensatory time regulations prohibits employer compelled use of accrued comp time absent an agreement. See, DOL Letter Rulings September 14, 1992, available in 1992 WL 845100; April 1, 1994, available in 1994 WL 1004765; August 19, 1994, available in Thomson, Fair Labor Standards Handbook at 212; and " Brief of the United States as *Amicus Curiae*"on petition for *certiorari* in this case.

ARGUMENT

I. THE EXPRESS STATUTORY PROHIBITION ON THE PAYMENT OF FLSA OVERTIME BY COMP TIME IN LIEU OF CASH DICTATES THE REASONABLENESS OF A RULE THAT THE USE OF ACCRUED COMP TIME ALSO MAY NOT BE COMPELLED BY THE EMPLOYER ABSENT AN EMPLOYEE AGREEMENT.

The Fifth Circuit erred when it found that the purpose of the FLSA statutory compensatory time provision in §207(o) established a presumptive -- "default rule" -- right in the employer to compel the use of accrued comp time. The Fifth Circuit erred in approving the compelled use practice reflected in the record stipulation. The

compensatory time rule in §207(o) is a conditional exception to the otherwise mandatory, soundly based, and longstanding provision that all FLSA overtime must be paid in cash at time and one-half the employee's regular rate of pay. As a conditional exception to the basic statutory rule requiring cash payment for overtime, §207(o) requires, at minimum, a presumption favoring employee control of the use of accrued comp time.

A presumption favoring employee over employer control of accrued comp time banks in the absence of express terms to the contrary reflects the statutory burden placed upon the employer to secure agreement from its employees for substituting comp time for cash overtime. 29 U.S.C. §207(o)(2)(A). Absent agreement, comp time may not be used at all and the employer must pay cash for overtime. The statutory presumption against the use of comp time recognizes that in many ways comp time is an inferior form of overtime compensation, not the least of which is that unlike "cash in the bank" accrued comp time remains subject to the possibility of devaluation through employer scheduling manipulation. Further, the authors of the national hours of work standard, particularly Senator Black, were keenly aware of the unequal bargaining power

between employers and employees in many work places.[15] Thus, the statute mandates cash overtime in all cases in which no express, freely arrived at, agreement with the employee exists, which otherwise reflects all of the Act's protection.[16]

When a comp time agreement does exist, however, but fails to expressly resolve an eventuality such as an employer claim of a right to compel use, the presumption must be that the employees -- having had no obligation to agree to comp time at all -- did not grant such a right to the employer. Where the only consequence of non-use of comp time is the potential triggering of the baseline requirement of cash overtime payment that would apply in the absence of an agreement, the burden of securing an agreement allowing compelled use should rest on the employer just as the burden of securing any comp time agreement rests on the employer.

No agreement of any kind ever existed which authorized Harris County to compel the Deputies to burn off their compensatory time. Absent such an agreement, freely accepted without coercion and containing all of the prerequisites of the §207(o) regulation, the Harris County compensatory time system outlined in the record stipulation here violates the Fair Labor Standards Act. Such a system

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[15] See, n.4.

[16] See, Argument IV on agreements.

is an inadequate and illegal substitute for the payment of cash overtime.

No doubt the availability of paying for necessary work time in any medium except cash is a great temptation to an employer. It is hardly surprising that any employer who views compensatory time as a means of avoiding the premium compensation costs of FLSA overtime will ultimately come to the "concern," reflected in the Harris County Attorneys' 1992 letter to the Department of Labor, that "cash reserves must ultimately be set aside to pay the accrued compensatory time." When that happens, employers, such as was the case in Harris County, will be "looking for ways to decrease that liability," such as compelled burn off at the employer's convenience. Congress foresaw that ultimate day of reckoning. The legislative history shows that Congress was "very concerned that public employees... will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time." Congress emphasized in this regard that "compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation." See, House Report No. 99-331, 99th Cong., 1st Sess. at 10. Where an employer seeks to establish such a compensatory time system as a means of avoiding the cost of FLSA premium rate overtime compensation, as Harris County openly admits here, that system must be found to violate the Act,

for its very design is to undermine the central enforcement mechanism of the national hours of work standard. Such a system of compensatory time devalued by the unilateral manipulation of work schedules is inadequate under the Act to release the employer of the obligation to compensate employees for all of their overtime at time and one-half in cash.

While it must be said that in the express statutory language of §207(o) the Congress has not spoken to the precise question raised here, it also must be accepted that the most reasonable reading of the statutory language and its legislative history is that accrued compensatory time belongs to the employee and that absent a freely accepted mutual agreement to the contrary, which agreement otherwise fully complies with the requirements of §207(o), the employer does not have the right to compel employees to consume their accrued comp time. For those employees working under compensatory time agreements that do not address compulsory use, the "compensation" they thought they would receive in lieu of cash with equivalent value, would be devalued and converted into an employer's right to manipulate time off to the employer's convenience. Such a result not only damages the bargain struck between the employee and the employer, but it strikes a serious blow to the basic FLSA requirement that all FLSA overtime must be paid at premium rates.

II. THE COURTS ARE CONTROLLED IN THEIR APPLICATION OF FLSA § 207(o) BY THE DOL'S CONSIDERED JUDGMENTS ON THE MATTER.

Since the enactment of the 1985 FLSA Amendments, provisions on public sector §207(o) compensatory time in lieu of cash overtime, and the promulgation of §207(o)'s implementing regulations, this Court has issued two major decisions concerning the application of the Act to public employees.[17] Each

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[17] There has been a ten year, two stage history of litigation concerning the application of the §207(o)'s compensatory time provisions of the FLSA Amendments Act of 1985. The first series of cases from 1988 through this Court's *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), decision in 1993 dealt with the steps necessary to establish compensatory time system under the agreements required by the Act, especially in jurisdiction which did not allow collective bargaining representation.

Since 1993, compensatory time litigation has concentrated not on the steps necessary to establish a system of compensatory time but rather on issues surrounding the ownership and use of accrued compensatory time banks once established. Five years of such litigation have resulted in five major decision by Courts of Appeal concerning the use of accrued §207(o) compensatory time banks: (1) *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied*, *Schriro v. Heaton*, 515 U.S. 1104 (1995)(holding, on the basis of the statutory language in 29 U.S.C. §207(o)(5) and the related DOL regulations in 29 C.F.R. §§553.23(c)(1)(ii) and 553.25(b)), that banked compensatory time is the property of the employee the use of which may not be compelled by the employer; (2) *Local 889, AFSCME v. Louisiana*, 145 F.2d 280 (5th Cir. 1998)(holding that no FLSA violation occurs when an employer first deducts compensatory time when an employee request annual leave, distinguishing *Heaton* on the basis that in *Heaton* the court was faced with a situation where the employer would force employees to take compensatory time, but indicating that the Fifth Circuit did "not necessarily agree with *Heaton*"); (3) the Fifth Circuit decision in this

(continued...)

recognized the controlling weight afforded the considered judgment of the Secretary of Labor on FLSA issues which Congress has vested in the Secretary's regulatory authority. *First*, in *Moreau v. Klevenhagen*, 508 U.S. 22 (1989), writing for a unanimous Court, Justice Stevens emphasized the need for consistency with the DOL's interpretation of the 1985 Amendments Act, 508 U.S. at 23; and the

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[17](...continued)
case (holding that an employer even absent an agreement may compel the use of compensatory time on the basis of a "default rule" that an employer is free to control the work place absent an agreement preventing such control but containing a strong dissent calling for a remand of the case to allow an application of the relevant DOL regulations and interpretations, especially, those with regard to "agreements"); (4) *Collins v. Spokane Valley Fire Protection District No. 1*, 1999 U.S. App. LEXIS 20027 (9th Cir. August 12, 1999), *pet. for certiorari pending*, No. 99-788 (1999) (relying on the Fifth Circuits decision in this case and criticizing *Heaton* in holding that the FLSA does not prohibit employers from requiring the use of compensatory time while at the same time discussing the "agreement" requirements of the Act and an exhaustion issue raised on the facts since the Spokane Fire Protection District had a collective bargaining agreement relating to the use of comp time); and (5) *Aiken v. Memphis*, 5 Wage and Hour Cas. 2d (BNA) 961, 1999 W.L. 689468 (6th Cir., September 7, 1999) (holding that a practice of restricting access to accrued compensatory time not at the point of "undue disruption" but rather at the point at which the employer would begin having to pay replacement workers was legal on the basis on the freedom of the parties to define "reasonable period" through an agreement citing 29 C.F.R. §553.25(c) over a strong dissent that the holding was contrary to the interpretation of the Department of Labor of its own regulations, particularly the "undue disruption" rule in 29 C.F.R. §553.25(d) which contains no provision allowing modification by agreement).

"special deference" owed the Secretary in applying her own regulations, 508 U.S. at 24.

Second, in *Auer v. Robbins*, 519 U.S. 452 (1997) Justice Scalia, again for a united court, wrote that

> where, as here, and as the Fifth Circuit Court of Appeals below found, "Congress has not spoken clearly in the text of the statute or the legislative history," and where the Congress has clearly vested the Secretary of Labor with the authority to issue regulations under the statute and to apply, interpret, and enforce those regulations, the interpretation by the Secretary of Labor is the reference point which controls judicial application of the statute. *Auer v. Robbins*, 519 U.S. at 457 (1997). "Because Congress has not directly spoken to the precise question," Justice Scalia wrote, "we must sustain the Secretary's approach so long as it is based on a permissible construction of the statute." 519 U.S. at 457. The courts must defer to all of the Secretary's "fair and considered judgement on the matter in question," even those which are set forth in a brief or opinion letter and not expressly contained in the Department's "legislative" or "interpretative" regulations. *Auer* , 519 U.S. at 462.

III. THE SECRETARY OF LABOR INTERPRETS FLSA § 207(o) TO PREVENT EMPLOYERS FROM COMPELLING THE USE OF COMPENSATORY TIME, ABSENT AN AGREEMENT WITH EMPLOYEES.

There can be no question that the Secretary of Labor's interpretation of § 207(o) is one which prevents employers from compelling the use of compensatory time, absent an agreement with employees. In 1992, when specifically asked by the Harris County attorney's office whether a practice of the compelled use of compensatory time was allowed, the Wage and Hour Division responded that such a practice was not allowed. See, DOL Letter Ruling, available in 1992 WL 845100 (September 14, 1992). The Solicitor General reemphasized that interpretation in their brief in support of the grant of *certiorari*. See, above at 17-19. The DOL position is a fully considered judgment on the precise issue. The interpretation is certainly a reasonable application of the statute.

IV. A FREELY ARRIVED AT BILATERAL AGREEMENT CONSISTENT WITH §207(O) IS A MANDATORY PREREQUISITE TO EMPLOYER COMPELLED USE OF ACCRUED COMP TIME.

The national hours of work standard set by the Fair Labor Standards Act is a statutory guarantee the very purpose of which is to modify the common law concept that the employment relationship is entirely contractual and the "default rule," relied upon by the Fifth Circuit below, under which one view of the American employment at-will

system dictates that absent an agreement between employer and employee to the contrary the employer may unilaterally set all the terms of employment. The very purpose of the national wage and hour standards in the FLSA is to impose statutory requirements applicable to every covered job. The effectiveness of a national standard can be undermined as effectively by overly broad waiver theories as it can be by "actual" violations. For this reason, statutory rights under the FLSA cannot be abridged or waived by contract or through an agreement between an employer and a union or between employer and employee. *Barrantine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 720 (1981) and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945). Further, as an exception to the more general statutory rule prohibiting the substitution of compensatory time for cash overtime, §207(o) is designed to be narrowly construed under strictly enforced conditions. See, *Klevenhagen*, 508 U.S. at 25; *Kentucky Finance Co.*, 359 U.S. 290, 295-296 (1959); and cases collected above at 11.

At the same time, the FLSA and its regulations contain provisions which make specific reference to the use of "agreements" between the parties as a guide to the resolution of questions arising under the statute and regulations.[18] Each of those provisions operates within the

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[18] There are at least nine primary examples of this within the statute:

(1) 29 U.S.C. §207(b) refers to employment "pursuant to a collective bargaining agreement under the NLRA" which limits hours of work as a basis for coverage under the Act's overtime requirements;
(2) 29 U.S.C. §207(e)(7) refers to "extra compensation provided by a premium rate paid an employee, in pursuance of an applicable employment

(continued...)

narrow constraints of its exact language, is narrowly applied and must be applied in recognition of the more general rule that basic FLSA statutory and regulatory overtime rights may not be waived by agreement or contract. The use of "agreements" as a tool within the regulations is always in the context in which the "agreements" are subordinate to the regulation. The specific provisions of §207(o) and the related regulations incorporating a requirement of employee "agreements" as one of the constraints on employer access to compensatory time requires specific and careful attention with an eye to the more general rules (a) that FLSA statutory rights may

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[18](...continued)

agreement or collective bargaining agreement" as a part of the definition of the FLSA "regular rate";
(3) 29 U.S. C. §207(f) refers to agreement in establishing the "irregular hours" exception to the standard 40 hour work week;
(4) 29 U.S.C. §207(g)(1),(2) and (3) refer to agreements in delineating the rule applicable to "piece work;"
(5) 29 U.S.C. §207(j) refers to agreements in setting alternative hours of work standards for certain hospital employees;
(6) 29 U.S.C. §207(n) refers to agreement in determining the FLSA rights of electric railway, trolley operators and motor carrier employees;
(7) 29 U.S.C. §207(o) on compensatory time refers to agreements as discussed in this case;
(8) 29 U.S.C. §207(p)(1)(3) references FLSA deference to agreements to aid in resolving a rule on one public safety employee substituting for another; and
(9) 29 U.S.C. §216(c) refers to agreements "to accept payment" as waivers in resolving FLSA enforcement disputes.

not be altered or waived by contract or agreement; (b) that exceptions to general rules must be narrowly construed; and (c) that overtime compensation must be paid in cash at time and one-half or compensatory time which is of equivalent value to the 150% premium cash requirement; and (d) that where the "agreement" conflicts with the statute or its regulations, the agreement is always superseded.

There is a single provision within statutory §207(o) referencing "agreements" and three major references to "agreements" in the related regulations. Statutory §207(o)(2) mandating that compensatory time itself may be used "only pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the agency and representatives of such employees" with an alternative provision that where "(i)" does not apply the agreement may be with individual employees. After *Moreau v. Klevenhagen*, 508 U.S. 22 (1993) it is clear that in Harris County the agreement would be with individual employees. The only statutory provision relating to the **use** of accrued compensatory time, 29 U.S.C. § 207(o)(5) contains no reference to "agreements" and provides only that employee requests to use their compensatory time made within a "reasonable period" must be granted unless the use of the time off would "unduly disrupt" employer operations. There is no other mention of "agreements" in the statute's compensatory time provisions.

The applicable §207(o) regulations contain three major references to "agreements." *First*, the general provision reflecting the statutory scheme and its constraint on employer use of compensatory time in lieu of cash overtime absent an agreement with employees, 29 C.F.R. §553.23. *Second*, §553.23(a)(2) references agreements as a permissible means of "governing the preservation, use and

cash out of compensatory time **so long as these provisions are consistent with §207(o) of the Act. To the extent that any provision of an agreement or understanding is a violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).**" And *third*, the rules on conditions for use of compensatory time ("reasonable period" "unduly disrupt") in §553.25(c)(2) indicate that the terms of such "agreement" or understanding [under §553.23] will "govern the meaning" of "reasonable period" (§553.25(c)(2)), but no similar agreement incorporation appears in the "undue disruption" rule (§553.25(d)).

The regulations expressly provide that FLSA compensatory time agreements may -- (1) restrict compensatory time payment to certain hours of the day disallowing it in others, §553.23(a)(2)(first sentence); (2) restrict comp time to certain jobs or employees and refuse it to others, §553.23(c)(i)(third sentence); (3) provide for a combination of time off and cash payment for overtime work so long as the total resulting compensation equals time and one half the employee's regular rate, §553.23(a)(2)(second sentence); (4) define the "reasonable period" in which requests to use compensatory time may be made, §553.25(c)(2); and (5) include provisions on the preservation, use and cash out of compensatory time **so long as those provisions are consistent with the other requirements of §207(o),** §553.25(a)(2)(third and fourth sentences).

The regulations are also clear that a compensatory time agreement may **not** provide for: (1) retroactivity, but must be arrived at before the work is performed, §553.23(a)(1); (2) less than time and one-half overtime compensation, §553.20(last sentence); (3) accruals of more than 480 hours, §553.22; (4) supersession of the "undue

disrupt rule," §553.25(d); (5) rejection of the employers authority to cash out compensatory time at any time, §553.26(a); (6) reduction below the regulatory standard of the rate at which compensatory time is paid out if an employer chooses to buy it out, §553.27(a); (7) reduction of the rate below the regulatory standard to which compensatory time is paid at termination, §553.27(b); (8) a "use it or lose it" provision, §553.25(b); (9) an override of protection of a degree of employee flexibility in the use of compensatory time, §553.20(second sentence); (10) the "payment in lieu of cash overtime of more compensatory time than an employer can realistically and in good faith expect to be able to grant on request of the employee," §553.25(b); or (11) reduction in the economic value of compensatory time below a level equivalent to premium rates of cash overtime at time and one-half, that is the value of compensatory time must be susceptible to calculation "just as the mandatory [cash] rate is calculated", §553.20.

Absent an "agreement" freely agreed to by the employee involved and arrived at without coercion, which is consistent with these §207(o) mandates, an employer may not compel the use of accrued compensatory time. As the Department of Labor informed Harris County in response to a formal request for a Letter Ruling:

> ... a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed, **if** the prior agreement **specifically** provides such a provision, and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure. See §553.23(c). Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to **require** an employee to use accrued compensatory time.

As the Eighth Circuit emphasized in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied*, *Schriro v. Heaton*, 515 U.S. 1104 (1995) --

> Employees are allowed to "bank" compensatory time in what amounts to an employee-owned savings account of compensatory time. The banked compensatory time essentially is the property of the employee. [citing, 29 C.F.R. §553.23(c)(1)(ii) and §553.25(b).] We read section 207(o)(5), the only section addressing the method of using banked compensatory time, to be consistent with the understanding that banked time belongs to the employee. Section 207(o)(5) specifically gives the employee the right to access to and control of the use of that banked time subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation. As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses, subject only that the employee may not "unduly disrupt" the public employer's operations in doing so. 43 F.3d at 1180.

CONCLUSION

This Court should overturn the Court below and remand this case for a decision consistent with the United States Department of Labor's interpretation of 29 U.S.C. § 207(o) that a public agency, absent a preexisting agreement, may not compel employees to use accrued compensatory time.

Respectfully Submitted,

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Exhibit 1: Section-by-Section Analysis
29 CFR § 553.20-28

The Department of Labor's Compensatory Time and Compensatory Time Off regulations under FLSA Section 7(o) are contained in 29 C.F.R. Sections 553.20 through 28. They contain eight subsections.

Section 553.20 contains an introduction which indicates that the compensatory time regulations provide "an element of flexibility to State and local government" and "an element of choice to their employees," and emphasizes that compensatory time must be at time and one half "just as the monetary rate is calculated."

Section 553.21 re-publishes the statutory language of Section 7(o):

*7(o)(1) allows compensatory time in lieu of cash at premium rates;
*7(o)(2) requires that compensatory time is allowed only pursuant to an agreement with the employee or an employee representative;
*7(o)(3) sets a limit on compensatory accrual at 480 hours in public safety and requires that when compensatory time is paid off it shall be paid at the regular rate at the time of payment;
*7(o)(4) provides that employees with accrued compensatory time at termination be paid at a protected rate;
*7(o)(5) provides that requests to use compensatory time made within a reasonable period must be allowed "if the use of compensatory time does not unduly disrupt operations";

*7(o)(6) contains definitions of compensatory time and compensatory time off.

Each of the statutory provisions protects employees from potential employer manipulation of a compensatory time system. None of the provisions suggest a rule which would allow an employer to compel the use of accrued compensatory time. The only statutory provision related to use protects the employees' right to use accrued comp time within a reasonable period of making a request and permits a rejection of such a request only on "undue disruption" grounds.

The statute itself does not suggest that an employer might force the use of compensatory under an agreement let alone absent such an agreement. The reference to "agreement" provisions "governing the preservation, use and cash out" of compensatory time appears only in the regulations at §553.23(a)(2) and there it is modified by "**so long as these provisions are consistent with section 7(o) of the Act.**" To the extent such provisions are not so consistent they are "superseded" by the Act and its regulations.

Section 553.22 makes clear that the compensatory time limits and regulations do not apply to compensatory time earned prior to the effective date of the 1985 amendments.

Section 553.23 addresses the requirement that compensatory time be the subject of an "agreement or understanding prior to the performance of work" as set out in section 7(o)(2)(A) of the Act. Subsection (a) (1) sets forth the general agreement requirement. Subsection (a)(2) indicates that the agreement to use comp time in lieu of cash may be limited to certain hours of the day, may provide for any combination of cash and comp time, and

may "include provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act." The language is clear that any provisions of an agreement not consistent with the Section 7(o) of the Act is superseded by the requirements of Section 7(o). Subsection (b) deals with representatives. Subsection © deals with agreements with individual employees.

Section 553.24 deals with "public safety," "emergency response" and "seasonal" activities and sets limits of either 480 hours or 240 hours on a amount of compensatory time which may be accrued. Subsection (b) deals with the situation of an employee transfer from work covered by the 480 hour limit to the lower 240 hour limit and provides "the employee will not be required to cash out the accrued compensatory time in excess of the lower limit. However, the employer must compensate in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit." No mention is made of the possibility of an employer requirement to compel to use of compensatory time to adjust the bank at the lower level.

Section 553.25 is the provision on "Conditions for use of compensatory time ('reasonable period,' 'undue disruption')." Subsection (a) sets forth the statutory requirement in Section 7(o)(5) that an employee "who has accrued compensatory time, **shall** be permitted to use such time with a "reasonable period" after making the request, if such use does not 'unduly disrupt' the operations of the agency."

Subsection (b) emphasizes that "compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to

accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time." The suggestion by Harris County that it may have granted or be granting so much compensatory time that its administrative needs require it to compel use suggests that the County is in violation of this provision of the regulations.

Subsection (c) delineates the meaning of the "reasonable period." This is one of the sections of the regulations which specifically refers to "agreements" between the parties. The regulation indicates that the meaning of "reasonable period" "will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case." Subsection (c)(2) provides that "to the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in Section 553.23, the terms of such an agreement or understanding will govern the meaning of "reasonable period."

Section (d) delineates the meaning of "undue disruption" and provides that "when an employer receives a request for compensatory time off, it shall be honored unless to do so would 'unduly disrupt' the agency's operations." It is significant that the provision referencing Section 553.23 agreements with regard to the meaning of "reasonable period" does not appear in the provision with regard to "undue disruption." The "undue disruption" rule is one of the provisions of the statute which may not be waived or avoided by an agreement.

Section 553.26 deals with cash overtime payments and makes clear that the payment of overtime in cash always remains at the employee's option. Thus, the

Department of Labor's suggestion in their September 1992 letter to Harris County that one solution to their inquiry of July 1992 was simply to buy out their employees compensatory time banks. DOL Letter Ruling, September 14, 1992, available in 1992 WL 845100.

Section 553.27 deals with "payment for unused compensatory time." Section 553.28 deals with non-FLSA compensatory time.

Exhibit 2: The Regulatory Comments and Compelled Use of Comp Time

The regulatory comments spoke directly to the question presented here--

1. The National League of Cities [the "NLOC"] recommended that a DOL reference to an "element of flexibility" for the employer and an "element of choice" for employees in 29 C.F.R. § 553.20 should be eliminated. The DOL kept the reference, pointing out that --

> [t]he legislative history indicates that the intent of section 7(o) was "to provide flexibility" to state and local government employers and an "element of choice" to their employees regarding compensation for statutory overtime by covered employees. (*Citing*, H. Rep. at 19).

2. The DOL accepted suggestions that it make 29 C.F.R. § 553.23 clear that provisions contained in compensatory time agreements which conflict with Section 7(o) are not valid.

3. The Public Employee Department, AFL-CIO, and other public employee representatives, expressed concern that the regulations leave no doubt that the element of choice in employees' use of compensatory time would not allow a unilateral employer imposed system. The DOL pointed out that the House Report states at page 20 that, "The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and the employee, or notice to the employee, prior to the performance of the work." The DOL emphasized that if the notice option is used employees must accept compensatory time "freely and without coercion" and maintained that language in 29 C.F.R. § 553.23(c).

4. The NLOC suggested that the "element of choice" allowed employees in some situations might be so small as to be limited to the freedom not to accept the position and find other employment. The DOL rejected this stating that both the Senate and the House provide that the agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may be made a condition of employment but "**only so long as** (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the comp time received may be **preserved**, used, or cashed out consistent with the provisions of the new subsection." (*Citing*, S. Rep. 11 and H. Rep. 20 (emphasis supplied)).

5. The NLOC suggested that the requirement that the employee "knowingly and voluntarily" agree to compensatory time agreements as a condition of employment be deleted. The DOL refused, stating that both the House and Senate legislative histories support the requirement. (*Citing*, H. Rep. at 20; S. Rep. at 11).

6. Commenters suggested revisions in 29 C.F.R. § 553.25's rules on the preservation and use of comp time. The AFL-CIO asked that it be made clear that the intent of the Act was to give employees the right to receive compensatory time and not the employer "the right to grant it." The DOL responded that --

> [t]he legislative history does indicate that an employee should not be coerced to accept more compensatory time in lieu of overtime pay than an employer can realistically and in good faith expect to be able to grant the employee within a reasonable time of his or her making a request to use such time. The rule has been modified to make clear that compensatory time is not envisioned as a means to

avoid overtime compensation, (H. Rep. at 23), and that an employee has a right to be able to use the compensatory time earned.

7. The NLOC disagreed with the statement in 29 C.F.R. § 553.25 that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time." The DOL insisted on keeping the rule. (*Citing* H. Rep. at 23, and S. Rep. at 12). The DOL also pointed out that the Congress has directed that for employees where problems of disruption of service to the public are persistent, compensatory time should not be the preferred method of compensating for overtime work.

8. The methodology developed by the DOL to estimate the cost of compliance with the compensatory time provisions make clear that accrued compensatory time should be viewed as a "bank" or "saving" of compensatory time for later use at the call of the employee and not as a reserve of time which an employer might use as a reserve for mandatory time off during down time. (51 Fed. Reg. 25710 (July 16, 1996) and 52 Fed. Reg. 2012 (January 16, 1987).

Finally, 9. DOL's record keeping rules with regard to compensatory time in 29 C.F.R. § 553.50, are consistent with the view of accrued comp time as a bank owned by the employee and require that the agreement or understanding allowing and controlling its preservation and use of compensatory time must either be a written document or must be preserved in a record of its existence. 29 C.F.R. § 553.509(d).

See, App. G, Pet. App. at 61a *et seq.*

(33)

Jan 13 2000

No. 98-1167

In The

Supreme Court of the United States

EDWARD CHRISTENSEN, et al.,

Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

PARTIES TO THE PROCEEDING

Petitioners:

Edward A. Christensen; Kenneth O. Adams; David W. Addison; Jose A. Alvarado; Robert Amboree; Bobby G. Andrews; Randy Anderwald; Gary R. Ashford; Craig L. Bailey; Richard Bailey; Richardo E. Balderaz; Herbert V. Barnard; Gerald Barnett; Paulette M. Barnett; Brad T. Bennett; Bridgett Blackmon; Flynt E. Blackwell; Gary F. Blahuta; Scott P. Blankenburg; Deborah Bliese; Bruce H. Breckenridge; J. W. Brooks; Brian Buchanan; Patricia M. Bui; Don E. Bynum; Clarence A. Callis; William M. Campbell; Heather Carr; Thomas J. Carr; Paul E. Carpenter; Robert Casey; Mark E. Cepiel; Eladio C. Chavez; Roy Clark; Denny D. Coker; Alford A. Cook; Gregory P. Cox; Donald D. Crayton; Richard D. Crook; David A. Davis; Gary W. Davis; Christopher E. Dempsey; Russell Dukes; Larry A. Eikhoff; Frank Fairley; David W. Finely; James P. Fitzgerald; Erine R. Fowler; Michael A. Garcia; Thomas M. Gentry; John Godejohann; Robert M. Goerlitz; David Gonzales; Raul V. Gonzales; Miguel A. Gonzalez; Billy Gray; William L. Gray; Lawrence P. Gries; Thomas P. Gurney; Preston R. Halfin; Sammy Head; Neil Hines; Larry D. Howell; Marshall P. Isom; James A. Johnson; Derry L. Jones; David E. Kaup; William C. Kenisell; Howard J. Kimble; Steve Kirk; Edgar D. Knighten; Freddy G. Lafuente; Michael G. LaGrone; Al Lanford; Vernon S. Lemons; Shemei B. Levi; Jeanne Long; Timothy Loyd; Joe S. Magallon; David B. Martin; Pedro Martinez; Russell L. Mayfield; Terry McGregor; Robert C. Meaux; Stephen Melinder; Marty M. Mingo; D. D. Montgomery; Jose L. Morin; Richard O. Newby; Arthur W. Nolley; William R.

PARTIES TO THE PROCEEDING – Continued

Norwood; Richard C. Nunnery; Karen D. O'Bannion; Raymond E. O'Bannion; Guadalupe Palafox; Wayne Parinello; Deborah Petruska; James A. Phillips; Simon C. Ramirez; Michael B. Rankin; James C. Reynolds; Willard G. Rogers; Gerald M. Robinson; Joe Ruffino; Lance J. Scott; Rob R. Self; Donald Shaver; James K. Shipley; James Smedick; Gina K. Spriggs (Grahmann); Jeffery M. Stauber; Larry L. Strickland; Billy J. Taylor; Kerry Townsend; Richard S. Trenski; Gordon Trott; Ed Trotti; Richard D. Valdez; Dalton E. Van Slyke; Frank L. Vernagallo; Ruben Villarreal; Johnny F. Walling; Gerald R. Warren; James M. Watson; Thomas G. Welch; John H. Wheeler; Joseph L. Williams; Rwanda Wiltz

Respondents:

Harris County, Texas, Tommy B. Thomas, Harris County Sheriff

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BRIEF FOR RESPONDENTS

The question presented by this case was decided correctly by the Fifth Circuit below, 158 F.3d 241, and by the Ninth Circuit in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), *cert. pending*, 68 U.S.L.W. 3263, 3327 (Oct. 5 & Nov. 5, 1999). The Fifth and Ninth Circuits correctly held that Congress did not take away local governments' right reasonably to require law enforcement and fire protection employees to utilize accrued compensatory time, rather than "bank" that time in perpetuity.

The contrary holding for which Petitioners contend would defeat Congress's intent for enacting 29 U.S.C. § 207(o). A contrary ruling would permit employees of local governments to bank compensatory time until they reach the maximum number of hours permitted, return at that point to paid overtime, and preserve their "banks" of accrued compensatory time until they resign or retire, cashing it out at then-existing hourly rates. *See* 29 U.S.C. § 207(o)(3)(A), (B). That scenario affords little or no relief to local governments responsible for providing, within limited budgets, emergency police and fire protection to their citizens. Each employee, after his or her maximum cap of compensatory hours is reached (240 hours of accrued compensatory time in Harris County's case), will return to overtime pay, and the County will incur an ever-increasing future liability for "cashing out" employees' compensatory time "banks."

Absent clear direction from Congress, the Court should not impose the additional administrative and

financial burdens on local governments for which Petitioners and the *amici* supporting Petitioners contend. Providing police services in a major metropolitan county is already a demanding task. As natural disasters, law enforcement emergencies, and other unanticipated events occur, the Harris County Sheriff needs more deputies on duty on some days than others, and the needs often are great and wholly unpredictable. The Sheriff requires flexibility to deploy his forces on overtime as needs arise by awarding compensatory time off, and then reasonably to manage the County's liability for that compensatory time. As the Fifth Circuit correctly held, the Harris County policy at issue here does not violate 29 U.S.C. § 207(o), and that should end the judicial inquiry. The decision below should be affirmed.

STATEMENT OF THE CASE AND THE STIPULATED FACTS

This case was tried below on the following stipulation of the pertinent facts:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who for purposes of the Fair Labor Standards Act are considered non-exempt, will be maintained below a predetermined maximum level. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that an employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce his or her accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employee and the supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision within the Department on an informal basis.

Pet. App. D, pp. 29a-31a; Pet. Br. at 20-21.

Petitioners' Brief overlooks important parts of the stipulated facts. Unlike the impression Petitioners attempt to create, the employees of the Harris County

Sheriff's Department are not required arbitrarily to use accrued compensatory time. As the stipulated facts establish, the Sheriff's Department alerts employees as their accrued compensatory time nears the maximum and asks them voluntarily to schedule time off. Failing that, Sheriff's Department supervisors attempt to reach an agreement with each employee about when time off will be taken. Only if no agreement can be reached with an individual employee is that employee scheduled for mandatory time off.

In addition, the Sheriff's Department does not require its employees to utilize *all* of their compensatory time. Harris County's policy comes into play only when an individual employee's time approaches the maximum, and the policy merely requires use of enough time so that the employee does not exceed the maximum number of compensatory hours permitted.

On the basis of the stipulated facts,[1] Petitioner's moved for summary judgment in the district court, contending that Harris County's policy described in the stipulation violates 29 U.S.C. § 207(o)(5). R. Doc. 26. Harris County filed a cross motion for partial summary judgment. The district court, relying on *Heaton v. Moore*, 43

[1] Since this case proceeded through both courts below solely on the stipulated facts (Pet. Br. at 20) Harris County objects to Petitioners' going outside the record in their Brief on the Merits to quote Harris County Personnel Regulations (Pet. Br. at 17-18) and correspondence between the Harris County Attorney's Office and the Wage and Hour Division of the Department of Labor (Pet. Br. at 18-19). The decision in this case should turn on whether Harris County's policy, as described in the stipulated facts, violates 29 U.S.C. § 207(o).

F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995), granted Petitioners' motion for summary judgment, declaring that "Harris County may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act." Pet. App. C. p. 28a (judgment of district court); *see Moreau v. Harris County*, 945 F. Supp. 1067, 1068-69 (S.D. Tex. 1996).

On appeal, in a majority opinion by Judge Higginbotham joined by Judge Parker, the Fifth Circuit reversed the district court and entered judgment for Harris County. 158 F.3d 241; Pet. App. A, pp. 1a-14a. Judge Dennis concurred in part and dissented in part. 158 F.3d at 247-51; Pet. App. A, pp. 14a-23a.

In August 1999, the Ninth Circuit considered the same question in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999). Examining the conflict between the Fifth Circuit in this case and the Eighth Circuit in *Heaton v. Moore*, the Ninth Circuit panel unanimously agreed with the Fifth Circuit majority in this case.

This Court granted certiorari on October 12, 1999. J.A. 4.

SUMMARY OF THE ARGUMENT

The 1985 Amendments to the FLSA were enacted to lessen the financial burdens imposed on local governments by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The

1985 Amendments permit employees of local governments to agree with their employers to accept compensatory time in lieu of overtime pay. Congress did not expressly foresee that employees might agree to accept compensatory time and then refuse to use it. Neither the statute, 29 U.S.C. § 207(o), nor the Department of Labor regulations expressly answer the question presented by this case.

But the intent of Congress on the question presented is discernible. In accordance with 29 U.S.C. § 207(o), Petitioners have agreed to accept compensatory time *in lieu of* overtime pay. The interpretation of section 207(o) for which Petitioners and the Solicitor General argue would permit these employees – contrary to their agreements – to receive and control compensatory time *in addition to* receiving paid overtime. Petitioners seek the right to "bank" compensatory time to the maximum limit, then return to receiving overtime pay, and to save their "compensatory time bank" for cashing-out at then-current rates of pay upon their retirement or resignation. This interpretation subverts the intent of the 1985 Amendments.

Nothing in section 207(o) or in the Secretary's regulations supports the notion that employees have an "employee owned savings account of compensatory time," that must be treated as if it is employee-owned cash, as the Eighth Circuit believed in *Heaton v. Moore*, 43 F.3d 1176. Rather, both the statute and the regulations create a balance between employers' and employees' needs. When an employee agrees to accept compensatory

time in lieu of overtime pay, there must be some mechanism for enforcing that agreement or the agreement becomes illusory.

Section 207(o) does not give exclusive control over compensatory time to employees. For example, even after an employee agrees to accept compensatory time in lieu of overtime pay, the employer may still eliminate as much of the compensatory time as it wishes by making a cash payment to the employee. The employee must accept that payment and cannot retain his or her compensatory time if the payment is made. When Congress has intended for the Fair Labor Standards Act to give public employees control over choices "solely at the employee's option," it has specifically so provided, as demonstrated by 29 U.S.C. § 207(p)(2),(3).

Although Petitioners argue Harris County's policy deprives them of the intended benefit of compensatory time, that is not the case. The stipulated facts show that Harris County encourages its employees voluntarily to schedule use of their compensatory time. Only when an employee fails to use compensatory time and declines to agree to a schedule for using compensatory time is the employee involuntarily scheduled for time off by County supervisors. The purpose of compensatory time is time off from work. Harris County provides for employees to have the time off at the rate of one and one-half hours of compensatory time off for each hour of overtime worked.

Petitioners' and the Solicitor General's call for deference to Department of Labor regulations and an informal Wage and Hour Division Opinion Letter should be rejected. The regulations do not address the question

presented by this case. The Solicitor General seeks support from a plainly erroneous interpretation of a sentence in 29 C.F.R. § 553.23(a)(2), which states that an agreement between an employer and its employees *"may"* include other provisions governing the preservation, use, or cashing out of compensatory time. The Solicitor seeks to turn that *permissive* sentence into a *mandatory* sentence, arguing that an employer is not allowed to have rules about using compensatory time unless the employer and its employees have agreed to such rules in their "agreement or understanding." That is an impermissible interpretation of the regulation. The regulation states no more than preservation, use, and cashing out of compensatory time are proper subjects for collective bargaining or negotiation between public employers and their employees.

The Wage and Hour Division's September 14, 1992 Opinion Letter is not entitled to deference. The Secretary of Labor does not even suggest that her formal interpretations of the FLSA published in the Code of Federal Regulations are entitled to *Chevron* deference, 29 C.F.R. § 531.25; thus this informal, private Opinion Letter is not entitled to such deference. On its face, the Opinion Letter is not a reasoned opinion, but merely a statement of the Wage and Hour Division's "position." The Wage and Hour Division has issued inconsistent opinion letters about compensatory time usage. Finally, the Opinion Letter's interpretation of the Act and the regulations is plainly incorrect.

ARGUMENT

I. ADOPTION OF PETITIONERS' CONSTRUCTION OF SECTION 207(o) WOULD DEFEAT CONGRESSIONAL PURPOSE AND INTENT.

A. BACKGROUND OF THE 1985 AMENDMENTS TO THE FLSA AND THE DEPARTMENT OF LABOR REGULATIONS IMPLEMENTING THOSE AMENDMENTS.

The statute at issue, 29 U.S.C. § 207(o), was enacted as part of the 1985 Amendments to the Fair Labor Standards Act ("FLSA"), in response to this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court held that the FLSA could constitutionally be applied to local governments. In response to the *Garcia* decision, "both Houses of Congress held hearings and considered legislation designed to ameliorate the burdens associated with" the changes that would have to be made in response to that decision. *Moreau v. Klevenhagen*, 508 U.S. 22, 26 (1993). "The projected 'financial costs of coming into compliance with the FLSA – particularly the overtime provisions' – were specifically identified as a matter of grave concern to many States and localities." *Id; see also* S. REP. NO. 99-159 at 8 (1985), *reprinted in part in* 1985 U.S.C.C.A.N. 651, 655-56 (recognizing that the legislation was in response to the effects of *Garcia* regarding FLSA principles with respect to employees of local governments); H.R. REP. NO. 99-331 at 8, 17 (1985) (same).

To that end, the 1985 Amendments allow local governmental agencies to award compensatory time "in lieu of" overtime pay after an employee agrees to accept

compensatory time. The Petitioners in this case are parties to the requisite agreements to accept compensatory time. *See Klevenhagen*, 508 U.S. at 29.[2] These agreements are important to Harris County. Employees engaged in law enforcement often work overtime because they are called upon to deal with matters such as natural disasters, criminal investigations, and other emergency situations. Extra demands for law enforcement services often cannot be planned or reasonably budgeted for, and they often require many more deputies and support personnel than normally are on duty. Thus, it is not unusual for law enforcement personnel to remain on duty for many hours of overtime during individual pay periods.

The focus of concern when Congress approved compensatory time in lieu of overtime pay was on the employee's ability to make *use* of his or her accumulated compensatory time. *See* H.R. REP. NO. 99-331 at 23. Congress did not contemplate the situation with which the Court is now faced because it believed employees would use compensatory time once it was accrued. *See* 131 Cong. Rec. 28,987 (1985) (statement of Sen. Kasten) ("This [legislation] will allow workers with erratic work periods more flexibility in meeting their needs."); 131 Cong. Rec. 29,224

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[2] As stated in the parties' stipulation, Harris County's personnel regulations provide for compensatory time off for its employees. In their brief the Petitioners purport to quote the current Harris County personnel regulation pertaining to compensatory time and state that the provision was readopted as it had appeared in the regulations at least since 1992. Pet. Br. at 17 n.12. The quoted personnel regulation is outside the record and is not the regulation currently in effect.

(statement of Rep. Martinez) ("[M]any employees . . . have actually come to prefer having comp time instead of overtime pay for those extra hours worked. To them, the extra time to spend on projects that benefit themselves, their homes, their future and their families, are more important than cash they could earn."); 131 Cong. Rec. at 29,225 (statement of Rep. Gilman) ("[This legislation] allows workers the freedom to receive deserved compensation in the manner they prefer while reducing the compliance cost of [*Garcia*] for public employers. Many of the hard-working people employed by our State and local governments value their private time more than the overtime pay they could earn."); *see also* Opinion Letter from Wage & Hour Div., Dep't of Labor (March 26, 1986), *available in* 6A LAB. REL. REP. (BNA) WHM:99:5091, 5092 ("The FLSA has no effect on the conditions for the scheduling and/or the use of compensatory time off. . . . ").

Congress sought to balance the employee's right to make use of earned compensatory time and the employer's need for flexibility in operations. As a result, Congress provided that the employee must be permitted to use the time within a reasonable period after requesting to do so, so long as the requested use of time does not unduly disrupt the agency's operations. 29 U.S.C. § 207(o)(5); *see* S. REP. NO. 99-159 at 23. Congress's concern expressed in Section 207(o)(5) *was not* that the employee might *have to use* his or her compensatory time, but that the employer might *prevent* the employee from doing so. Congress was concerned that employees might be "coerced to accept more compensatory time in lieu of overtime payment in a year than an employer realistically

and in good faith expects to grant to that employee if he or she requests it within a similar period." *See* H.R. REP. No. 99-331 at 23; § 207(o)(5).[3]

Much of Petitioners' argument (and the argument of the *amici* on Petitioners' side) dwells on the original purposes of the FLSA. Their principal argument seems to be that permitting employees to bank compensatory time in perpetuity is in line with what they claim was the FLSA's hostility towards overtime work in general and a "default rule" that deters employers from requiring overtime by requiring payment for overtime work in cash. Petitioners' argument fails to acknowledge Congress's express choice in the 1985 Amendments to the FLSA to allow public agencies to award compensatory time in lieu of overtime pay. Petitioners' argument violates this Court's teaching in *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (emphasis added).

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[3] Petitioners quote the legislative history as follows: "Congress was 'very concerned that public employees . . . will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time.' " Pet. Br. at 29 (quoting H.R. REP. No. 99-331 at 23). Petitioners ignore the fact that Congress was *not* addressing compelled usage of accrued compensatory time by the employer, but instead was addressing its concern about employers giving compensatory time in lieu of overtime pay and then not allowing the employee to take the time given. *See* H.R. REP. No. 99-331 at 23.

The regulations adopted by the Secretary of Labor after the 1985 Amendments to the FLSA add nothing to answering the question presented by this case. For the most part, the regulations reiterate what is already in the statute. *See, e.g.*, 29 C.F.R. § 553.22; § 553.23(a)(1). Other sections of the regulations address subjects not related to the question in this case.

Judge Dennis, concurring and dissenting in the Fifth Circuit, thought that one of the Secretary's regulations, 29 C.F.R. § 553.23 (a)(2), could be expanded beyond its express terms to provide guidance for this case. *Moreau*, 158 F.3d at 247-51 (Dennis, J., dissenting). As *amicus curiae*, the United States picks up that theme in this Court. Section 553.23 of the regulations is titled "Agreement or understanding prior to performance of work," and states, in pertinent part: "The agreement or understanding *may* include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act." 29 C.F.R. § 553.23 (a)(2) (emphasis added).

Section 553.23(a)(2) states *only* that the employer and employee *may agree* to terms about the utilization of accrued compensatory time. In other words, those are *permissible* subjects for collective bargaining or negotiation between public employers and their employees. The regulation does *not* say or even imply that there *must* be an agreement regarding utilization of accrued compensatory time before an employer may make reasonable rules about that subject. If during the rulemaking process, the Secretary of Labor thought that the 1985 Amendments stripped local governments of power to have reasonable

rules requiring their employees to utilize accrued compensatory time off, the Secretary should have proposed a regulation implementing that view, and subjected such a regulation to a comment period and judicial review. It is not proper for the United States to try in this Court to convert the *permissive* statement in 29 C.F.R. § 553.23(a)(2) into a *compulsory* requirement that precludes local government employers from making reasonable rules to manage their responsibilities and budgets with respect to employee compensatory time, unless their employees agree to such rules.

B. PERMITTING THE EMPLOYER TO REQUIRE THE USE OF COMPENSATORY TIME MERELY GIVES MEANING TO THE 1985 AMENDMENTS TO THE FLSA.

Petitioners have agreed to accept compensatory time in lieu of overtime pay under the FLSA. Harris County's rule (which no party challenges as violative of the FLSA) is that an employee's accrued compensatory time may not exceed 240 hours. If the employees' agreements to accept compensatory time in lieu of overtime pay are to have their intended effect, the law must allow Harris County to require its employees to reduce their accrued time to keep it below the 240 hour cap.

If a public employer may not require its employees to reduce accumulated compensatory time at or near a statutorily-allowed cap, then the 1985 Amendments to the FLSA will become a nullity, one employee at a time. Each employee returns, by law, to overtime pay as soon as he or she accumulates the capped number of compensatory

time hours, despite his or her agreement to accept compensatory time in lieu of overtime pay. The careful balance that Congress struck between employees' needs and local agencies' need to manage their limited, taxpayer-supported budgets will be lost. Petitioners' claim that employees have the sole choice whether to use compensatory time, if adopted, would merely build in a delay before public agencies again must pay overtime, despite their employees' agreements to accept compensatory time off in lieu of overtime pay. *See* 29 U.S.C. § 207(o)(1) ("Employees of a public agency . . . may receive, in accordance with this section *and in lieu of* overtime compensation, compensatory time. . . . ") (emphasis added).

Under the system advocated by Petitioners, employees will be allowed to bank compensatory time to the maximum cap and then revert for all future overtime hours to overtime pay. When and if the employee chooses to use his or her compensatory time, the employer must allow it; but then the employee can fill his or her bank to the maximum hour cap again and revert to overtime pay. The compensatory time bank will provide, in essence, another resignation or retirement benefit to the employee, to be "cashed in" upon resignation or retirement at then-current (probably higher) rates of pay. Local governments will have to accrue for ever-increasing liabilities for unused compensatory time. The statutory allowance of compensatory time in lieu of overtime pay that Congress enacted to alleviate financial pressures on local governments will be illusory.

The 1985 Amendments to the FLSA and the legislative history demonstrate that Congress believed that the employees would use, or could be required to use,

accrued compensatory time, thereby relieving public employers from the obligation to pay cash for overtime work. Neither the 1985 Amendments to the FLSA nor the legislative history shows any intent to create a new form of "savings account" or "retirement or resignation benefit" for public employees. Compensatory time was to accommodate the needs of the local governments while ensuring (1) that public employees receive a form of compensation – time off – at a premium rate for overtime worked and (2) that employees' use of their compensatory time not be delayed unreasonably.

When determining the meaning of a statute, the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The policy of the 1985 Amendments was to allow public agencies to provide their services within limited budgets by permitting them to agree with their employees that the employees would accept compensatory time in lieu of overtime pay. *See* 29 U.S.C. § 207(o)(1). The object of the Amendments *was not* to permit employees of public agencies to receive overtime pay *in addition to* building a "bank" of compensatory time available for use, or cashing in at resignation or retirement. When the 1985 Amendments are seen in that light, it is clear that Harris County's compensatory time policy does not contravene 29 U.S.C. § 207(o) or the intent Congress had when it enacted that statute.

C. THE REASONING OF THE EIGHTH CIRCUIT IN *HEATON V. MOORE* IS FLAWED.

The Eighth Circuit's opinion in *Heaton v. Moore*, is incorrect and should be disapproved by this Court. 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995). The basis for the *Heaton* court's holding was its pronouncement that "[e]mployees are allowed to 'bank' compensatory time in what amounts to an employee-owned savings account of compensatory time." *Heaton*, 43 F.3d at 1180. "The banked compensatory time is essentially the property of the employee." *Id.* The court thought that the employee should be allowed to use his or her "savings account" of compensatory time in the same way an employee can spend overtime pay. *See id.* Judge Dennis, in his concurring and dissenting opinion in this case below, did not adopt the Eighth Circuit's rationale; and the Fifth Circuit majority and the Ninth Circuit in *Collins v. Lobdell* rejected it altogether. *See Lobdell*, 188 F.3d at 1128-29; *Moreau*, 158 F.3d at 247-51 (Dennis, J., dissenting). The United States, appearing here as an *amicus curiae*, does not appear to endorse the Eighth Circuit's rationale.

The *Heaton* court thought the Department of Labor regulations "consistent" with its vision of "an employee-owned savings account of compensatory time." *See id.* at 1180 n.3 (citing 29 C.F.R. §§ 553.23(c)(1)(ii), 553.25(b)). Nevertheless, the Secretary's regulations do not answer (directly or indirectly) the question for which this Court has granted review. Nor do the regulations require the judiciary to reach any particular answer to that question.

For every right given employees in the statute and regulations, employers are given a balanced right. For instance, in order for the employee to receive compensatory time in lieu of overtime pay, the employee must agree. 29 U.S.C. § 207(o)(2). Nevertheless, the regulations allow a public employer to satisfy the requirement for an agreement by giving notice to its employees that compensatory time will be awarded in lieu of overtime pay. 29 C.F.R. § 553.23(c)(1). Unless a particular employee expresses his or her unwillingness to accept compensatory time in lieu of overtime pay, the notice satisfies the requirement of an agreement. *See id.*

Neither the statute nor the regulations mention "an employee owned savings account of compensatory time." Neither the statute nor the regulations purports to create a system by which individual employees unilaterally may convert their agreement to accept compensatory time off *in lieu of* overtime pay back to a system in which the employees have sole control of compensatory time, receive compensatory time for awhile and then qualify again for overtime pay. The notion of a "compensatory time savings account " created by the Eighth Circuit causes that result. That result contravenes the basic reason why Congress enacted the 1985 amendments to the FLSA. *See* H.R. REP. NO. 99-331 at 8, 17; S. REP. NO. 99-159 at 8.

D. THE REASONING OF THE FIFTH CIRCUIT MAJORITY IN THIS CASE AND THE NINTH CIRCUIT IS CORRECT.

The Fifth Circuit majority below and the Ninth Circuit recognized that neither the language of the statute nor the Secretary's regulations provide an answer to the question presented for review. *See Collins,* 188 F.3d at 1128-30; *Moreau,* 158 F.3d at 245. Both courts rejected the premise – argued by Petitioners here – that, because Congress stated that employees should be permitted to use their compensatory time upon request within a reasonable time, employees were otherwise given *exclusive* control over the use of accrued compensatory time. *See* 29 U.S.C. § 207(o)(5) (stating that an employee "who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.") This is the principle of *inclusio unius est exclusio alterius* that Petitioners would have this Court adopt. *See* Pet. Br. at 11-12.

As noted by the Fifth Circuit, an edict that an entity "should not be taxed for fifteen years" leads to the natural assumption that the entity can be taxed after the fifteen years have elapsed. *Moreau,* 158 F.3d at 246; *Raleigh & Gaston Ry. v. Reid,* 80 U.S. 269, 270 (1871). An edict that an employer, barring disruption of operations, must allow its employees to use compensatory time upon request does not lead to the natural assumption that the

employees have sole and exclusive control over their compensatory time.[4]

The Ninth Circuit agreed that "the FLSA does not prohibit public employers from requiring employees to use comp time." *Collins*, 188 F.3d at 1130. That is the result that makes the most sense under the Act, the legislative history, and the regulations. Once the employee and employer have agreed that the employee will accept compensatory time in lieu of overtime pay, there must be a method of enforcing that agreement. If an employee is free to accrue compensatory time to the maximum limit, hold that time in a "savings account," and then receive overtime pay while "banking" his or her compensatory time until resignation or retirement, that would undermine the employer-employee agreement, the statute, and Congressional intent.

Public employers must be permitted to adopt rules enforcing employees' agreements to accept compensatory

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[4] As the Ninth Circuit has noted, the rule of *inclusio unius est exclusio alterius* is "a rule of interpretation, not a rule of law." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). As that court explained:

> Understood as a descriptive generalization about language rather than a prescriptive rule of construction, the maxim usefully describes a common syntactical implication. 'My children are Jonathan, Rebecca and Seth' means 'none of my children are Samuel.' Sometimes there is no negative pregnant: 'get milk, bread, peanut butter and eggs at the grocery store' probably does not mean 'do not get ice cream.'

Id.

time off in lieu of overtime pay. Harris County's policy, as described in the stipulated facts, reasonably achieves that result. It encourages employees voluntarily to reduce accrued compensatory time as they approach the maximum allowable number of accrued hours. The policy then requires the employee and his or her supervisor to try to agree on how to reduce the accrued hours. Failing an agreement, Sheriff's supervisors schedule the employee for involuntary time off as necessary to keep his or her accrual under the maximum. This violates neither the language of 29 U.S.C. § 207(o) nor Congress's intent.

E. OTHER PROVISIONS IN THE STATUTE SUPPORT THE AUTHORITY OF THE COUNTY TO IMPLEMENT ITS POLICY.

Rather than an intent to allow employees to bank compensatory time in perpetuity, 29 U.S.C. § 207(o) reflects the contrary intent. It provides that "[i]f compensation is *paid* to an employee *for accrued compensatory time off*, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. § 207(o)(3)(B) (emphasis added). Likewise, the Secretary's regulations provide that "[p]ayments for accrued compensatory time earned after April 14, 1986, may be made *at any time* and shall be paid at the regular rate earned by the employee at the time the employee receives such payment." 29 C.F.R. § 553.27(a) (emphasis added).

As a result, both the statute and the regulations contemplate a circumstance in which a public employer may – without seeking the employee's permission – reduce or

eliminate the accrued compensatory time of an employee by making a cash payment.[5] As long as the employee is paid for his accumulated compensatory time at his or her current regular rate of pay, the statute is satisfied.

The regulations confirm that these pre-termination reductions are at the *employer's* option. 29 C.F.R. § 553.27(a) (stating that payments may be made at any time). Obviously, if the payments can be made at any time, the employer is choosing whether to make them. Neither the statute nor the regulations suggest that an employee has any right to demand payments. Moreover, if the employee were given such a right, the employer's option to substitute compensatory time for cash payments for overtime worked would become meaningless. Likewise, if it were necessary that the employee agree to a pre-termination reduction of accumulated compensatory time by cash payment, the employee could eliminate the future use of compensatory time by refusing to accept the cash payment and declining to use his or her accumulated compensatory time. This result would be contrary to Congressional intent.

Because 29 U.S.C. § 207(o)(3)(B) permits cash payments for accrued compensatory time, no rule of statutory construction or agency interpretation can provide otherwise. As the Court stated in *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992), "courts must presume that a legislature says in a statute what it

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[5] The payment provision in subsection (3)(B) must necessarily apply only to pre-termination reductions of compensatory time because subsection (4) covers payment at termination of employment.

means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Id.*

This provision allowing employers to reduce compensatory time with monetary payments also shows that Congress did not intend for employees to possess sole or exclusive control over accrued compensatory time. For example, there may be employees who would prefer to accumulate large quantities of compensatory time so that they can take long vacations. Nevertheless, the employer is given the option of depriving those employees of that ability by reducing the employees' compensatory time through payment. One cannot logically conclude – given this situation – that the employee has absolute control over the use of his or her compensatory time.

II. THE SECRETARY OF LABOR'S REGULATIONS DO NOT ADDRESS THE QUESTION PRESENTED, AND THE WAGE AND HOUR DIVISION'S OPINION LETTER IS NOT ENTITLED TO DEFERENCE.

A. THERE IS NO BASIS FOR "DEFERENCE" TO THE SECRETARY'S POSITION BECAUSE CONGRESSIONAL INTENT IS CLEAR.

Petitioners argue that "[t]he courts must defer to all of the Secretary's 'fair and considered judgement [sic] on the matter in question. . . . ' " Pet. Br. at 33. Similarly, the Solicitor General argues that "any uncertainty about the proper disposition of this case should be resolved by reference to the Secretary of Labor's reasonable regulations and interpretive guidance implementing the FLSA."

Brief for the United States as Amicus Curiae at 15. Petitioners and the Solicitor General base their call for "deference" on the premise that Congress has not spoken in the text of the statute or the legislative history with respect to the issue before the Court.

First, it should be noted that this argument is a significant departure from the Petitioners' argument in the Fifth Circuit. There Petitioners asserted that Harris County's policy requiring use of compensatory time "contravenes the *plain language* of the 1985 Amendments to the Act." (emphasis added). Petitioners' Appellee's Brief in the Fifth Circuit at 13. *See Moreau*, 158 F.3d at 241 (noting Petitioners' argument that section 207(o)(5) decides the issue). Now, Petitioners and the Solicitor General assert that the statute is silent with respect to the specific question before the Court. Pet. Br. at 25 ("[T]he statute is silent on the precise compelled use question raised here."). This Court should not accept Petitioners' and the Solicitor General's argument that the Court should decide this case by defaulting to some form of "deference" to the Secretary of Labor.

Although the 1985 Amendments do not expressly answer the precise issue in this case, Congress's intent can be discerned, and that intent is in line with the decisions of the Fifth and Ninth Circuits. Obviously, section 207(o) contains no words stating or even implying that local governments may *not* adopt reasonable policies requiring their employees to use compensatory time, once compensatory time has been agreed to. On the other hand, the statute allows employers to pay off accrued compensatory time at the employee's current hourly rate prior to the termination of employment. 29 U.S.C.

§ 207(o)(3)(B). The statute contains no restriction on the amount of compensatory time that may be "cashed out" by the employer. Thus, the employer is free to pay off an employee's entire compensatory time balance, or as little as a single hour at any time.

When Congress wanted in the FLSA to provide that a local governmental employer may exercise a particular right under the FLSA *only at the employee's option*, Congress knew exactly how to say that. In 29 U.S.C. § 207(p)(2) and (3), Congress allowed local governments certain flexibility to ask public safety personnel to work overtime in different capacities and to exclude such work from overtime compensation. But in each situation so authorized, Congress included the phrase "solely at such individual's option," thereby giving the employees sole control over the employer's exercise of the granted authority. *See* 29 U.S.C. § 207(p). No similar language in section 207(o) makes the rights granted under that section of the statute exercisable *solely at the employee's option*. Yet, Petitioners clearly seek to have the Court recognize a right to bank compensatory time to be used *solely at the employee's option*. This Court presumes that Congress acts "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994).

Further, the FLSA imposes only a minimum wage rate and a *maximum* number of hours of work per week. It does not require employers to provide a minimum number of hours of work. Consequently, an employer may shorten an employee's work week without violating the Act. If the employer may shorten work weeks and

cash out compensatory time separately without violating the Act, it may do so in combination as well by ordering the employee to use a portion of his or her accrued compensatory time. Thus, the intent of Congress is clearly expressed by the statute, and the Secretary of Labor's interpretation is not controlling. As this Court stated in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989), "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *See also National Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S. 479 (1998); *Demarest v. Manspeaker*, 498 U.S. 184 (1991).

The Solicitor General attempts to dismiss this argument by comparing this case to those in which this Court invalidated certain pay plans that were a "means of evading the FLSA's overtime requirements." Brief for the United States as Amicus Curiae at 18 n.9. Those cases clearly are different. They dealt with attempts to manipulate *rates* of pay. In this case, Harris County's policy does not reduce rates of pay. It reduces hours of work required to be performed. When Petitioners are required to utilize some of their accrued compensatory time, they are not required to report for work, yet they receive compensation at their current rate of pay for all compensatory hours utilized. Thus, their hours of work are reduced and they receive cash compensation for overtime hours previously worked. Neither of these "effects" of the policy is prohibited by the FLSA.

In *Adams v. City of McMinnville*, 890 F.2d 836, 838 (6th Cir. 1989), the public employer unilaterally changed the

work schedule of its firefighters. The effect of the change was to reduce the total number of hours each firefighter worked so that overtime pay would not be required. The firefighters alleged that this was discrimination prohibited by the FLSA. *See id.* The Sixth Circuit noted that the city did not attempt to alleviate the fiscal predicament threatened by the *Garcia* decision by reducing the firefighters' effective hourly pay rate, while requiring them to work the same number of hours. *See id.* at 839. The court concluded that "when a public employer responds to fiscal pressures created by the FLSA by reducing employees' hours in order that they not work overtime, thereby eliminating the city's need to pay premium wages for overtime, the employer does not violate section 8" of the Fair Labor Standards Amendments of 1985. *Id.* at 840.

The Sixth Circuit stated that legislative history explicitly distinguishes between a public employer who responds to the application of the FLSA to its employees by reducing their regular hourly pay rate and an employer who simply reduces the overtime hours its employees will work. Quoting from the legislative history, the court said the following:

> The Conference Committee noted that
>
> > [a] unilateral reduction of regular pay or fringe benefits that is intended to nullify this legislative application of overtime compensation to State and local government employees is unlawful. Any other conclusion would in effect invite public employers to reduce regular rates of pay shortly after the date of enactment so as to negate the

> premium compensation mandated by this legislation.
>
> Joint Explanatory Statement of the Committee of Conference, H.R.Conf.Rep. No. 357, 99th Cong., 1st Sess. 9, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 670. In contrast, the Conference Committee also stated that "[a]n employer's adjustment of work schedules to reduce overtime hours would not constitute discrimination under this provision so long as it was not undertaken to retaliate for an assertion of coverage." *Id.* at 8, 1985 U.S. Code Cong. & Admin. News 670.

890 F.2d at 840.

Here, Harris County's compensatory time policy does not reduce the employee's effective hourly rate of pay. Petitioners contend that this policy is a "means of avoiding the cost of FLSA premium rate overtime compensation" which must be found to violate the Act. Pet. Br. at 29. That contention is meritless because Harris County must pay for overtime work at a premium rate. The employee works one hour of overtime and is provided one and one-half hours of compensatory time off for that one hour of work. The policy simply allows Harris County the relief which Congress intended to make available to public employers when it enacted section 207(o).

Petitioners imply throughout their brief that Harris County's compensatory time policy deprives them of the intended benefit of compensatory time. In that regard Petitioners speak of compensatory time being "devalued" by the "unilateral manipulation of work schedules" and

manipulation of time off to the "employer's convenience." Pet Br. at 30. The underlying premise of this description is that Sheriff's Department supervisors always make unilateral decisions about when employees may take compensatory time off, and employees never get to select times of their own choice. That premise is an unacceptable distortion of the stipulated facts. *See* Pet. App. D, pp. 29a-31a. As the stipulated facts show, supervisors schedule involuntary compensatory time only after the employee has approached the maximum accrued number of hours, the employee has failed voluntarily to schedule time off, and the supervisor and the employee have not been able to agree about a schedule for time off.

The intended benefit of compensatory time off is *time off from work*. Petitioners seek here to bank the maximum amount of compensatory time for a future payment in cash, and then to return to overtime pay. In the final analysis, this case concerns something that Congress never intended – a claimed right to "bank" compensatory time indefinitely in order to return to overtime pay and to create a savings account to be cashed in at termination of employment equal to 240 hours times a rate higher than that in effect at the time the overtime was worked. The conflict between the parties is not about "flexibility" or "opportunities to take extended vacations."[6] If accrued

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[6] In the Brief for the United States as Amicus Curiae at 17, it is suggested that Congress enacted Section 207(o) primarily to preserve public employees' freedom to enjoy opportunities to take extended vacations, get away from job stress and attend to family matters, citing hearings before the Subcommittee on Labor Standards of the House Committee on Education & Labor and the Subcommittee on Labor of the Senate Committee on Labor & Human Resources.

compensatory time can be banked until termination of employment, public employers will be faced with a significant budgetary problem. Congress enacted the 1985 Amendments to allow local governments to avoid such problems.[7]

B. THE DEPARTMENT OF LABOR'S OPINION LETTER IS NOT ENTITLED TO DEFERENCE.

As discussed infra at pages 33-34, the Secretary of Labor's *regulations* do not address the question presented by this case, and it is improper for Petitioners and the Solicitor General to try to rewrite those regulations in the guise of *interpretation*. Recognizing this, Petitioners and the Solicitor General ask the Court to defer to an *Opinion*

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[7] One commentator has described the passage of the Amendments as follows:

> It is undisputed that the decision to allow comp time in the public sector was predicated on a desire to ameliorate projected labor cost increases for cities and states because of compliance with the FLSA, particularly its overtime provisions. The public sector comp time provisions of the FLSA are thus the product of a political deal struck when there were substantial and possibly destructive fiscal pressures on states and municipalities. Beyond acknowledging that comp time was already common practice for many public employers and often incorporated into collective bargaining agreements, the legislative history makes no mention of a desire to be 'family friendly' or to promote 'flexibility'.

David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 111 (1999).

Letter from the Wage and Hour Division of the Department of Labor to Harris County, dated September 14, 1992, *available in* 1992 WL 845100 (hereinafter the "Opinion Letter"). Petitioners quote from the Opinion Letter at page 19 of their Brief. Petitioners and the Solicitor General have raised the Opinion Letter for the first time in this Court. Petitioners did not rely on it in the Fifth Circuit, and it is not mentioned in either of the opinions below. *See* 158 F.3d at 241; 945 F. Supp. at 1067. The Opinion Letter was not relied on by the Eighth Circuit in *Heaton v. Moore*, 43 F.3d at 1176, or the Ninth Circuit in *Collins v. Lobdell*, 188 F.3d at 1124.

The Wage and Hour Division's informal Opinion Letter certainly is not entitled to deference under the second step of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Secretary of Labor does not even suggest that her *formal* "interpretations" of the FLSA, published in the Code of Federal Regulations, are entitled to *Chevron* deference. 29 C.F.R. § 531.25. In the introduction to those formal interpretations, the Secretary acknowledges that "the ultimate decisions on interpretations of the [FLSA] are made by the courts," and she contemplates that they will be given only the respectful consideration described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). 29 C.F.R. § 531.25. Without question, the informal, private Opinion Letter on which Petitioners and the Solicitor General rely is of even lesser force than the Secretary's published, formal interpretations of the FLSA.

Several of the Circuits correctly have declined to give Wage and Hour Division Letter Opinions *Chevron*-type deference. *E.g., Myers v. Copper Cellar Corp.*, 192 F.3d 546,

554 (6th Cir. 1999); *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 524-25 (5th Cir. 1999); *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993); *see* K. Davis & R. Pierce, Administrative Law Treatise § 3.5 at 120 (3d ed. 1994) ("Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals, guidelines, and briefs. No court should allow an agency to bind citizens or courts by applying *Chevron* step two to Agency policy decisions announced in formats Congress has not authorized for that purpose.").

There are compelling reasons why this particular Opinion Letter should be given no weight by this Court. First, it is hardly a reasoned opinion of any type. It is, on its face, little more than a statement of the Wage and Hour Division's "position." Both of the operative paragraphs of the Opinion Letter start with the phrase "it is our position that. . . . "

Second, the position of the Wage and Hour Division on the question discussed in the Opinion Letter has not been consistent. In 1986, shortly after 29 U.S.C. § 207(o) became law, the Wage and Hour Division answered the following question about compensatory time awarded to police officers:

> [D]o the provisions of FLSA limit management's authority to schedule the use of earned compensatory time off . . . at its discretion, or must there be a mutual agreement between the employer and employee regarding when this time may be taken off?

The Division answered: "The FLSA has no effect on the conditions for the scheduling and/or use of compensatory time off under these circumstances." Opinion Letter from Wage & Hour Div., Dep't of Labor (March 26, 1986), *available in* 6A Lab. Rel. Rep. (BNA) WHM:99:5091.

In a 1988 opinion letter, the Division answered the following question pertaining to game wardens: "May an employer require that earned compensatory time be taken off *within the same work period* in the absence of a specific agreement?" Opinion Letter from Wage & Hour Div., Dep't of Labor (July 29, 1988), *available in* 6A Lab. Rel. Rep. (BNA) WHM:99:5212, 5213. (Emphasis in original). The Division answered: "We presume that your question means: may an employer 'balance' the employee's hours of work over the length of the work period so that the statutory maximum hour standard is not exceeded. The answer is yes." *Id.* If a game and fish agency can require its wardens to work overtime early in a pay period and then take compensatory time off later in that same pay period without violating the FLSA, the agency should also have power to require that compensatory time off be taken in subsequent pay periods, after an employee's accrual nears the maximum number of hours, without violating the Act.

Finally, the Opinion Letter (and the central argument of the Brief of the United States as *Amicus Curiae*) is based on a plainly incorrect reading of 29 C.F.R. § 553.23(b). The regulation says only that an agreement or understanding between a public employer and its employees "*may* include other provisions governing the preservation, use, or cashing out of compensatory time, so long as those provisions are consistent with section 7(o) of the Act." It

neither says nor suggests that such an agreement is mandatory, and it cannot be read to mean that the employer is powerless to enforce reasonable policies regarding "the preservation, use, or cashing out of compensatory time" in the absence of an agreement about such matters with its employees.

The complexities that would be created by the broad prohibition for which Petitioners and the United States contend are endless. To argue, as Petitioners and the Solicitor General necessarily do,[8] that 29 U.S.C. § 207(o)(2)(A) must be read to imply that decisions concerning "use" of compensatory time belong entirely to employees absent a pre-existing agreement to "empower" their local employers to enforce reasonable policies concerning such matters is a plainly erroneous interpretation of the Act.

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[8] To reach the result for which he contends, the Solicitor General must resort to highly attenuated argument not consistent with any reasonable rules of statutory construction, *viz*: "Absent an agreement to the contrary . . . , an employee's greater power to insist on monetary compensation for *all* overtime includes a lesser power to accrue compensatory time as he or she wishes. . . . " Brief of the United States as Amicus Curiae at 14.

CONCLUSION

For these reasons, the judgment of the Fifth Circuit should be affirmed.

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In The
Supreme Court of the United States

EDWARD CHRISTENSEN, et al.,
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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PETITION FOR CERTIORARI FILED JANUARY 19, 1999
CERTIORARI GRANTED OCTOBER 12, 1999

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Introduction

Absent a mutual agreement, may an employer order employees to burn off accrued compensatory time under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA")?[1/]

[1/] The *amicus curiae* Spokane Valley Fire District No. 1 claims without foundation that Harris County had an agreement, within the terms of the FLSA, including a specific policy permitting the County to direct the use of compensatory time. No such agreement exists; nor has one ever existed. No such agreement is reflected in the stipulated facts. The question on which the Court granted *certiorari* is premised on the absence of such an agreement. Harris County did not contend in their brief in opposition to the petition for a writ that there was such an agreement. They, therefore, waived any such claim under Supreme Court Rule 15: "Any objection to consideration of the question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." In any event, the Harris County continues to make no such claim in the Brief. They make no such claim because there exists no such agreement. Whatever the facts might have been in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999) *petition for cert. pending* (October 5, 1999), where a collective bargaining agreement was in place, the Petitioners here have no such "compelled use of compensatory time" agreement with Harris County or its Sheriff's Office. The general "compensatory time agreement" found to exist between the deputies and the Sheriff's Office as a result of *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), was based on the fact that each Harris County Deputy has signed a brief, boiler plate payroll compensation form that said that the Deputy understood and accepted the County's personnel regulations. No Harris County personnel regulation contains a compelled use of compensatory time provision. *See* Pet. Br. at n. 12. Harris County Personnel Regulation 8.02 was the only related regulation when this case was litigated below and for the entire 1992-1995 pre-litigation/litigation period covered by the applicable statute of limitations. While it is not set forth in the Stipulated Record, it is a formal enactment of the Commissioners' Court of Harris County, Texas, of May 14, 1998, and reference to it as Harris County administrative law is appropriate. Harris County claims in their Brief at n. 2 that Personnel Regulation 8.02 is "not the regulation currently in effect" without citation

Senator Hugo Black condemned the company scrip paid as wages to the depression era Alabama mine workers he represented -- hard earned wages paid in tender redeemable solely in company owned stores. "The employers dish out company scrip from one vest pocket; their employees cycle it back into their other pocket." The future Justice argued, "It is self evident that this approaches not being paid at all." Senator Black led the New Deal effort to ban the use of such scrip in favor of mandatory cash overtime in the 1938 Fair Labor Standards Act. Today, it is equally self evident that wages paid in future time off, which the employer then orders burnt off on the employer's schedule and at the employer's convenience, is not the equivalent of premium overtime pay. It too, approaches not being paid at all. Accordingly, the Department of Labor's considered judgment is that the Fair Labor Standards Act public sector compensatory time provisions, 29 U.S.C. §§ 207(o) and 29 C.F.R. §§ 553.20-28, provide that, absent a willing, freely accepted agreement, which is consistent with the requirements of the Act and the regulations, and which is

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to any revisions or changes. In fact, the current Harris County Personnel Regulation 3.01-3.0234 effective July 1, 1999 continues to authorize payment in compensatory time but without a provision which authorizes employer compelled use of accrued compensatory time. No where in the relevant regulation is there any mention of compelled use or other express provision on the "preservation, use and cashing out" of compensatory time. The Rule does contain provisions that compensatory time is "carried forward indefinitely," "may be used at any time approved by the employee's supervisor" and deference to "applicable federal and state statutes, rules and regulations." There is nothing in the Stipulation below which establishes that the Supervisors' orders to burn off compensatory time are the result of an agreement between the parties or a provision of a Harris County personnel regulation.

arrived at without coercion, an employer may not compel the use of accrued compensatory time. *See, detailed commentary* in Kearns (ed.), *The Fair Labor Standards Act* (ABA Labor and Employment Law Section, BNA Books, 1999) at 33-34 and 659-668, particularly, "There are no limitations on an employer's ability to cash out accrued comp time at the employee's regular rate at the time of payment, **but employers cannot force employees to use their comp time.**" *Kearns* at 666. The beneficial use of accumulated compensatory time is an employee's right. H. Rep. 99-331, App. G at 68a.[2/] The Congressional sponsors of §207(o) wrote:

> Once these limits are reached [the statutory maximum of 480 hours for public safety compensatory time accruals] an employee must be paid in cash for additional hours of overtime or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time.
>
> H. Rep. 99-331, App. G at 65a.

Congress makes no endorsement of employer compelled use of accrued compensatory time in the Act or in its legislative history. Accrued FLSA compensatory time banks may be reduced only in one of four ways:

[2/] The legislative histories of both the Act and the Department of Labor Regulations are reprinted in Petitioners' Appendix to the Petition for a Writ of Certiorari and which is incorporated by reference in the Joint Appendix. The page citations to the legislative history reflect the pages in the Appendix to the Petition. The Appendices references are those used in both the Appendix to the Petition and the Joint Appendix.

1. An employer may buy out accrued compensatory time for cash at any time, 29 C.F.R. §§ 553.26(a) and 553.27(a); or
2. An employee may receive cash for unused accrued compensatory time upon termination at a rate not less than the employee's average regular rate during the last three years of employment or the employee's final regular rate, 29 U.S.C. § 207(o)(4) and 29 C.F.R. §§ 553.27(b) and (c); or
3. An employee may use accrued compensatory time upon a reasonably timed request unless granting the request would "unduly disrupt" the employer's services, 29 U.S.C. § 207(o)(5); or
4. An employee or his or her representative may knowingly, willingly and absent coercion enter into a mutual agreement with the employer with regard to the "preservation, use and cashing out" of compensatory time which expressly provides for employer scheduling of accrued compensatory time off so long as the agreement is specific,[3/] agreed to prior to the work involved, 29 U.S.C. §207(o)(2)(A)(ii) and 29 C.F.R.§553.23(a)(1), is consistent with § 207(o) and its implementing regulations, and preserves employee flexibility. Pet. Br. at 37-39; DOL Opinion Letter (September 14, 1992) *available in* 1992 WL845100 (1992); and U.S. Br. at 5-6, n. 4, 12-13 and 19-21.

Otherwise, an employee's unused compensatory time bank[4/] may not be reduced. The Congress emphasized:

> Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting the obligation. H. Rep. 9-331, App. G at 68a.

An employer may not, absent an agreement, command that an employee burn off compensatory time. Here Harris County supervisors command employees to burn off accrued

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[3/] The *amicus curiae* Spokane Valley Fire Protection District No. 1 argues at 11-12 that the plain language of the FLSA indicates that compensatory time agreements will be general rather than specific and at 18-19 that if Petitioners' position were the rule compensatory time plans would be "unreasonably detailed." Nothing in the language of the Act suggests that such agreements would be general. Both the legislative history of the compensatory time provision § 207(o), S. Rep. 99-159, App. H at 73a, and the applicable regulations, 29 C.F.R. § 553.23, App. F at 46a, state that such agreements may include among other provisions, "provisions governing the preservation, use and cashing out of compensatory time so long as those provisions are consistent with section 7(o) of the Act." The agreements, therefore, may be "detailed" and not "general" to the extent they deal with this topic. At the same time, there is nothing which indicates that such agreements must be "unreasonably detailed." The agreements may be as simple and sparse or as complicated and dense as the parties want. If an issue arises that the parties did not anticipate or if circumstances change, it is relatively easy to modify any agreement, so long as the modification is freely and willingly agreed to by the parties and is consistent with the requirements of § 207(o) and its regulations.

[4/] Harris County claims that nothing in the statute nor the regulations supports the notion that employees have an "employee owned savings account of compensatory time..." Resp. Br. at 6. In fact, Congress and the Department of Labor exchanged a July 16, 1986 report on the cost impact of §207(o) which clearly referred to accumulations of accrued compensatory time as "banks." *See*, 51 Fed. Reg. 25710, App. J at 100a.

compensatory time wherever they approach a limit, below the statutory maximum of 480 hours and within the Harris County maximum of 240 hours, set by their Bureau Commander. This they may not do absent an agreement provision on the preservation, use or cashing out of the time properly authorizing employer compelled scheduling. Harris County's Brief argument to the contrary contains two fundamental errors and contains a less fundamental analytical flaw.

I. Harris County Misconstrues The Purpose Of § 207(o) And Errs In Rejecting Deference To The Department of Labor.

Harris County's Brief rests on two central faulty premises: Harris County misconstrues Congress's central purpose and intent in enacting § 207(o) and errs in rejecting deference to the Department of Labor's considered interpretation and application of § 207(o).

A. Congressional Intent. Harris County argues that their interpretation of §207(o), which would authorize employer compelled use of accrued compensatory time, must be accepted over the Secretary of Labor's interpretation, which would not allow an employer to compel compensatory time absent a knowing and willing agreement providing for it, because Harris County's rule would allow employees to save more money in the administration of FLSA overtime than would the Secretary's rule. After all, Harris County argues, the overall purpose and intent of Congress in enacting the FLSA Amendments Act of 1985 was to reduce the cost of public sector post-*Garcia* compliance with the FLSA. The argument seriously misconstrues the specific Congressional purpose and intent in enacting §207(o). It also overstates the impact of a

general cost saving purpose of the statutory scheme intended, after *Garcia*, to tailor the FLSA to the special needs of the public sector work place when the statute, the Amendments Act of 1985, expressly delegates rule making to an administrative agency.

Harris County asserts incorrectly that the central overriding purpose of the Congress in enacting § 207(o)'s compensatory time provision was to generate a budgetary savings and relieve the financial burden on public employers in paying overtime at premium rates to their employees. Resp. Br. at 5-6, 9 and 16. While it is true that the FLSA Amendments Act of 1985 sought to reduce the cost of coming into compliance of the overtime rules of the FLSA after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), for example, by delaying for a year the date on which public employers were required to come into compliance with the FLSA, P.L.99-150, §6, 99 Stat. 787 (1985), such was not the sole purpose of the Amendments Act and certainly was not the central goal of the specific provisions on compensatory time in § 207(o). The new public sector compensatory time provisions of the Act were enacted to accommodate the existing practices of public sector compensatory time which had developed during the period in which the public sector was not covered by the FLSA. Public sector compensatory time was intended to provide "**flexibility** to state and local government employers and **an element of choice to their employees.**" *See* H. Rep. 99-331, App. G at 61a-63a. It was neither Congress's purpose nor its intent that the payment of compensatory time off in lieu of cash would result in an actual and significant savings to public employers. Yet, Harris

County would have a general Congressional cost saving goal dominate the application of §207(o) and override a specific interpretation of the Act made by the administrative agency to which the role of interpreting and enforcing the Act was assigned by Congress. P. L. 99-150 § 6 (1985).[5/]

During Congressional consideration of the 1985 Amendments Act, the Congressional Budget Office estimated the initial cost of complying with the FLSA after *Garcia* to be between $0.5 billion and $1.5 billion nationwide. The Department of Labor estimated annual cost at $1 to $3 billion. After enactment, the Department of Labor estimated that the Amendments Act of 1985 would reduce an annual $300 million cost of the *Garcia* decision by $84 million to $216 million, most of the savings being generated by a twelve month compliance grace period, and the new rules on joint employment, volunteers, and other revisions unrelated to compensatory time. 52 Fed. Reg. 2012 (July 16, 1987). The formal Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments provided by the Department of Labor

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[5/] Harris County argues that "Absent clear direction from Congress, the Court should not impose additional administrative and financial burdens on local government. . ." Resp. Br. at 1-2. No argument is made here which urges the Court to do so. Congress enacted the compensatory requirement to replace what had previously been an absolute requirement of cash overtime with a system of compensatory time under specific pre-conditions. No employer is required to use compensatory time and every employer always remains free to take advantage of the default rule for cash overtime. 29 C.F.R. § 553.26. Congress expressly mandated that the Secretary of Labor issue implementing regulations in P.L. 99-150, § 6 (1985). This case involves only the application of the statute and the regulations, and not the imposition of new burdens. *See also* n. 8 of the *amicus* argument concerning the "plain statement" rule.

revealed clearly that the compensatory time system would not result in significant savings and that "[a]nother factor which must be taken into account is the propensity of employees to 'bank' or save their compensatory time earned. To the extent that employees 'bank' their compensatory time, there will be a delay in the cost impact of the FLSA Amendments." App. J at 97a-100a. Congress did not anticipate that the provisions on compensatory time alone would reduce greatly the cost of compliance with the FLSA overtime requirement but rather that they would generate more flexibility for employers in scheduling the increased costs and an element of choice to their employers in planning and taking the time off they earn and desire. ***See***, S. Rep. 99-159, App. H at 70a (savings achieved "by deferring the effective date") and 71a (savings by "allowing lead-time in which to record budgetary priorities, while maintaining fiscal stability").

The Congressional sponsors of the 1985 Amendments were clear that "compensatory time is not envisioned as a means to avoid overtime compensation" and its cost but "is merely an alternative method of meeting the obligation." H. Rep. 99-331, App. G at 68a. The Senate Report explained the Congressional intent in the compensatory time provisions:

> The Committee . . . is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normal scheduled workweek. These arrangements – frequently the result of collective bargaining – reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable,

we wish to accommodate such arrangements.
S. Rep. 99-159, App. H at 71a.

Congress recognized that the value of compensatory time to employees was "in being able to make *beneficial use* of the accumulated time." H.Rep. No. 99-331 App. G at 68a (Emphasis added). The Senate clearly recognized that "[r]egardless of the number of hours accrued, the employee has the right to be paid for or use accrued compensatory time subject to this subsection [the rule on compensatory time]," S. Rep. No. 99-159 App. H at 74a. Further, "[t]he employee has a right to use some or all of his accrued comp time within a reasonable period after requesting such use..." S. Rep. No. 99-331 App. H at 74a.

There is nothing in the specific legislative history of § 207(o) to suggest that the central purpose or intent of the Congress in enacting the compensatory time provision was to reduce significantly the financial impact of premium overtime compensation on public employers. Congress recognized that *Garcia*'s application of time and one half overtime standards would result in some "financial costs of coming into compliance" and postponed the effective date of the FLSA's application by a year to diminish those costs. S. Rep. 99-159, App. H at 70a-71a. However, Congress intended that the use of compensatory time in lieu of cash overtime continue as a part of the more general FLSA provision for overtime at premium (time and one half) rates knowing that this requirement would not significantly save public employers money but only increase their scheduling "flexibility" while adding "an element of choice" to the rights of their employees. H. Rep. 99-331, App. G at 62 and 62a and S. Rep. 99-159,

App. H at 71a.

There is nothing in the legislative history of § 207(o) which supports Harris County's claim that Congress intended its compensatory time provision to save public employees money such that Harris County's theory of employer mandated use of accrued compensatory time "merely gives meaning" to that Congressional intent. Neither the express language nor the clear intent of the statute resolve the issue of employer compelled use of accrued compensatory time. Congress expressly delegated such issues to the Secretary of Labor. P.L. 99-150, §6 (1985).

B. DOL Deference. Harris County errs fundamentally in rejecting deference to the Department of Labor's considered and reasonable interpretation of the compensatory time rules under the Act. Resp. Br. at 23-34. Such deference is clearly proper under *Auer v. Robbins*, 519 U.S. 452 (1997); *Moreau v. Klevenhagen*, 508 U.S. 22 (1993); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both the Petitioners' ("Deputies'") original brief, Pet. Br. at 31-34, and the *Amicus* Brief of the Solicitor General, U.S. Amicus Br. at 10, 12, and 15, establish this.

Harris County, however, argues that the Secretary of Labor's regulations do not address the precise question presented here; Resp. Br. 7-8 and 13-14; and, that the September 14, 1992, Opinion Letter of the Wage and Hour Division, *available in* 1992 WL 8451000, in which the Wage and Hour Division responded to a specific letter from Harris County raising the question before the Court here, is not entitled to deference. Resp. Br. 30-34,

The regulations clearly provide that compensatory time

may be provided only pursuant to an agreement, and that the agreement may include provisions governing the utilization of accrued compensatory time. 29 C.F.R. §§ 553.20, 23, and 25, particularly 553.23(a)(2). The regulations provide, "The use of compensatory time must be pursuant to some form of agreement or understanding between the employer and the employee reached before the performance of the work." *See also* 29 C.F.R. § 553.50(d) (requiring that a record of the agreement must be kept). The 1992 Opinion Letter was a specific response to a request from Harris County which asked:

> While it is clear that the Sheriff must authorize an employee to use compensatory time within a reasonable period after it is requested, neither the Fair Labor Standards Act nor the regulations promulgated thereunder appear to expressly address whether the Sheriff may schedule non-exempt employees to use or take time off. Would such schedule violate the FLSA?
>
> Pet. Br. at 19.

The Department of Labor responded clearly that, absent an agreement to permit such mandatory use, neither the statute nor the regulations would "permit an employer to require an employee to use accrued compensatory time." Letter Ruling WL 845100 (September 14, 1992).[6/] Both in the letter and in

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[6/] Harris County argues that the September Opinion Letter is not in the stipulated record below and, therefore, should not be considered. Resp. Br. at n. 1. The letter is a formal opinion letter of the Department of Labor's Wage and Hour Division reprinted and available through the Department of Labor's Wage and Hour Division and WestLaw. The Department of Labor maintains an indexing system to FLSA Opinion Letters of the Wage and Hour Division, interpreting the FLSA and

the brief of the Solicitor General, the Secretary has interpreted her regulations to mean that compensatory time use is at the employees' discretion absent a specific agreement in which the employee willingly and knowingly agrees otherwise. Harris County has not, and cannot, claim that this interpretation is inconsistent with the statute. Harris County claims that the Petitioner and Solicitor General's interpretation is "plainly erroneous" focuses only on the sentence in the regulations governing the scope of the agreement and ignores the sentence in the regulations requiring an agreement in the first place.[7/]

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provides copies of the letters on request. A detailed index to the DOL Opinion Letters obtained by the Bureau of National Affairs is posted on the Internet under "Special Documents" on the ABA Labor and Employment Law-BNA Books Document Library (www.bna.com/bnabooks/abana/index.html). The particular Opinion Letter in this case should not have presented a challenge to Harris County since they requested the letter and it was addressed to them. *See*, Kearns (ed.), *The Fair Labor Standards Act* (ABA Labor and Employment Law Section, BNA Books, 1999). It is a legal authority of a category regularly relied on in disputes concerning the Department of Labor's interpretation of the FLSA. The fact that the letter was the result of a specific request from Harris County in this case does not lessen its availability as authority. It does diminish any doubt concerning its applicability to these facts.

[7/] Harris County also makes an argument concerning the use of the permissive word "may," rather than the mandatory "shall," in the regulation providing that compensatory time agreements "may include other provisions governing the preservation, use and cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act." 29 C.F.R. §553.23. Harris County claims that the Solicitor seeks to turn the "may" to "shall" and to make provisions in agreements on "preservation, use and cashing out" mandatory. The point is obviously a false one. No one argues that the regulation requires every compensatory time agreement to include such provisions. Neither

The Opinion Letter and Solicitor General's brief interpret 29 C.F.R. § 553.23 in its entirety, and that interpretation is a reasonable interpretation. The interpretation is, therefore, controlling under *Auer;* further, the regulations themselves are entitled to deference under *Chevron*.

Even if the regulations were silent on the question, and the 1992 Opinion Letter and Solicitor General's brief were understood as a fully considered direct interpretation of the statute, that interpretation would be entitled to *Chevron* deference. Official agency interpretations are entitled to deference even if they are made in the course of informal adjudication rather than rulemaking. *See, e.g., NationsBank v. VALIC,* 513 U.S. 251, 256-257 (1995); *Clarke v. Securities Industries Association*, 479 U.S. 388, 403-404 (1986). In *Auer*, an interpretation expressed for the first time in an *amicus* brief to this Court, was found to be controlling.

The Department of Labor's position has been fully considered, consistent and has not wavered. Harris County's claim to find inconsistency in two earlier Opinion Letters is faulty. The 1986 Letter cited by Harris County does not address compensatory time for FLSA overtime (the issue here).

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employer nor employee is required to include anything in a compensatory time agreement. Obviously, many employers would have no desire to mandate the forced use of accrued compensatory time. Many more would find their employees unwilling to agree knowingly and freely to forced use. Those employers and their employees need not necessarily include such provisions. However, if the employer and the employees involved, in fact, willingly and knowingly agreed to special provisions in these areas they "may" include them. Again, no one argues in this case that every compensatory time agreement "must" include such provisions.

The letter instead addresses compensatory time paid for hours which are regular time under the FLSA rules but overtime under a collective bargaining agreement which is not at issue here. *See*, 29 C.F.R. § 553.28(a) ("other compensatory time"). The 1988 Letter is also not on point. It explains that employers have flexibility to structure their employees' work schedules within any single pay period; it does not address whether an employer may order an employee to work fewer hours in a subsequent pay period to offset overtime earned in a prior pay period. 29 C.F.R. § 553.231(b).

II. Harris County's Analytical Error: Storing Comp Time.

Harris County also makes significant analytical errors.[8/]

[8/] The *amicus curiae* Spokane Valley Fire Protection District No. 1 brief includes two faulty arguments concerning the application of "federal law" to the issue before the Court.

Argument # 1. The "plain statement" rule that the Court has adopted to protect States' powers under the 10th Amendment requires that all ambiguities in a statute relating to the States be construed in the States' favor. Therefore, ordinary deference principles do not apply to this case. Amicus Br. at 19-21.

Response # 1. The "plain statement" requirement applies only to the scope of a statute's coverage – that is, the question of whether Congress intends to subject that States to regulation under the 10th Amendment. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Pennsylvania Dep't. of Corrections v. Yeskey*, 524 U.S. 206 (1998). It does not apply to the substantive provisions of a regulatory program which has clearly been held to apply to State and Local government. The Court did not invoke the "plain statement" rule in *Auer* or *Moreau,* where it applied a contrary canon that, as an exception to the FLSA's general cash overtime provision, the compensatory time provision must be narrowly construed against public employers who seek to take advantage of the exception. *Moreau*, 508 U.S. at 33. In any event, there is no ambiguity that Congress intends state and local government to be covered by the FLSA and the 1985

The most significant of which involves employee storage of compensatory time.[9/]

Harris County argues that the position of the Deputies would defeat Congress's intent because its result would be that

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Amendments Act. There is no ambiguity that Congress intended the Secretary of Labor to promulgate regulations implementing the 1985 Amendments. *See*, P.L. 99-150 § 6 (1985). Thus Congress clearly charged the Secretary of Labor with clarification of any statutory ambiguities which might arise with regard to the application or interpretation of § 207(o). *Argument #2.* The fact that in *Moreau* the Court looked at state law to construe the meaning of "representative" indicates that Congress intended the meaning of "agreement" under the FLSA to be resolved under state, not federal, law. Amicus Br. 24. *Response # 2.* The Court looked to state law in *Moreau* because it held that the Secretary of Labor's interpretation of the issue was controlling and the Secretary indicated that the meaning "representative" varied with state law. *See*, 508 U.S. at 34. The Secretary has indicated no similar reliance on state law here. To the contrary, the regulations and interpretations make clear that the meaning of "agreement" is a question of federal law settled within the Secretary's regulations and interpretations.

9/ Harris County also makes an analytical error when it argues that Deputies' position would entitle them to compensatory time "in addition to" rather than "in lieu of" cash overtime. Resp. Br. 6 and 16. This is not so. Employees receive either compensatory time or cash overtime, as provided by their agreements with the employer and in the statute. In no case would an employee receive both compensatory time and cash overtime for the same hours of work, unless it were part of a cash out exchange in which the cash was paid and the compensatory time bank diminished accordingly. When employees work for compensatory time up to the maximum and then are paid in cash for hours above the maximum, as the statute contemplates and explicitly provides, in no sense can it be said that they are receiving compensatory time "in addition to" rather than "in lieu of" cash.

employees could bank compensatory time until they reach the maximum, return at that time to cash overtime, and cash out the compensatory time at termination at higher compensation rates than when they earned the time. Resp. Br. 1-2 and 14-15. While the record contains nothing which would indicate that such is the Deputies' actual plan, if it were it would be perfectly consistent with Congressional intent.

There is no evidence whatsoever that Deputies here harbor such a plan or that Harris County has acted to take advantage of fairly simple statutory protections that would foil such a plan if one existed. There is evidence to the contrary. *First*, in the original complaint the Deputies complained not only of compelled use but also that the Sheriff's Office refused timely requests to use compensatory time when granting such requests would not "unduly disrupt" operations. While that element of the complaint was neither resolved nor carried forward on appeal, its assertion belies the Harris County claim that the Deputies harbor a plan never to use compensatory time. *Second*, while the statute sets the compensatory time maximum application to law enforcement at 480 hours; and the applicable Harris County maximum as set forth in the County Personnel Regulations 8.01 and in Respondents' Brief is 240 hours; under the stipulated facts below "each Bureau Commander determines the maximum number of hours that may be maintained by the employees in his or her bureau." Some of those limits are set at 70 hours. Harris County could work to foil the plan they describe by simply setting the maximum at a higher level making it more difficult for Deputies to return themselves to a cash overtime status. *Third*, employers have many methods of controlling the growth of

compensatory time banks.[10/] They may use 29 U.S.C. §207(k)'s extended public safety schedule replacing the 40 hour work week with a 171 hour in 28 day work period to reduce the likelihood of overtime. They may establish control over the preservation and scheduling of compensatory time through an agreement with their employees. They may assign work to employees who have not reached the overtime threshold or to employees with low compensatory accrual, or, as is the intent of the Act, they may hire additional employees to have the necessary work done without the need of overtime. Finally, as Congress suggested in enacting §207(o), and as Harris County's argument suggests may be the situation in the Harris County Sheriff's Department:

> Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employers where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work. H. Rep. 99-331, App. G at 68a.

Fourth, the most serious problem with the Harris County's theory is that the employer may under 29 C.F.R. § 553.26 cash out any and all compensatory time at the then existing overtime

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[10/] Harris County argues at page 19 of their brief that Deputies claim "that because Congress stated that employees should be permitted to use their compensatory time request within a reasonable time employees were otherwise given **exclusive** control over the use of accrued compensatory time." Deputies make no such argument.

rate. Therefore, were any employee to attempt to "manipulate" the system so as to create a permanently standing compensatory time balance earned at a low or beginning rate of compensation hoping to increase the value of that compensatory time by waiting to cash it out at a higher termination or retirement rate, the employer could foil the scheme at any time simply by cashing out the bank at any time and taking advantage of the lower pre-retirement rate in place at the time of cash out.

More importantly, the scheme outlined is perfectly consistent with congressional intent. The fact that Congress set a statutory compensatory time maximum in 29 U.S.C. § 207(o)(3)(A) indicates that Congress anticipated that employees could bank time and would sometimes reach the maximum. Congress expressly provided that once an employee met the maximum overtime he or she must be paid in cash. *Ibid.* Congress was clear about this -- once these limits [the maximums] are reached, an employee either must be paid in cash for additional accrued hours or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time off. H. Rep. 99-331, App. G at 65a. Congress also expressly provided that employees would be paid their accrued compensatory time at termination or retirement and prescribed the rate at which they must be paid. 29 U.S.C. § 207(o)(4). The Department of Labor also anticipated the situation outlined by the Harris County and reported it to Congress when the Department calculated the cost impact that the implementation of § 207(o) would have on state and local government. *See* 52 Fed. Reg. 2028-2029, App. J at 96a-100a. The Department of Labor estimated based on

federal employee experience that roughly 20% of employees would save all compensatory time hours. 52 Fed. Reg. 2012 ["methodology" ¶5 (not reprinted)].

Conclusion

Section 207(o)(5)'s rule on use of compensatory time shows that when Congress intended that an employer exercise control over an employee's use of compensatory time, Congress expressly so provided. This is especially important in the application of a statutory rule which is an exception to the general rule that all overtime must be paid in cash. Congress clearly did not provide that an employer can force an employee to burn off compensatory time when the employee does not wish to do so. Such a right if it existed would, as clearly as payment in script diminishes the value of wages, diminish the value of accrued compensatory time. It is highly unlikely that Congress would explain expressly that accrued time could be cashed out by the employer, 29 C.F.R. § 553.26, or used by the employee on timely request, 29 C.F.R. § 553.23, and yet approve such a diminishment in the value of compensatory time only by silence.

For all of these reasons and for the reasons set forth in Petitioner's Brief and the *Amicus* Brief of the United States, this Court should overturn the Court below and remand this case for a decision consistent with the Department of Labor's interpretation of 29 U.S.C. § 207(o) that a public agency may not, absent a pre-existing agreement, compel employees to use accrued compensatory time.

Respectfully Submitted,

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No. 98-1167

In the Supreme Court of the United States

EDWARD CHRISTENSEN, ET AL., PETITIONERS

v.

HARRIS COUNTY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(*o*), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

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INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for implementing and enforcing the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See, *e.g.*, 29 U.S.C. 216(c) and (e). As discussed in this brief, the Department of Labor has issued regulations and opinion letters relevant to the question presented here, and the United States has a substantial interest in the correct resolution of that question. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. The Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, generally requires covered employ-

ers to pay their employees a minimum wage and to compensate overtime work at a rate of one and one-half times the employees' regular rate of pay. 29 U.S.C. 206, 207. Public agencies, including federal agencies and state and local governments, are subject to the FLSA. 29 U.S.C. 203(d), (s)(1)(C) and (x). This Court has held that, under its power to regulate interstate commerce, Congress has validly applied the FLSA's minimum wage and overtime provisions to state and local governments. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which in turn had overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)).[1]

In 1985, in response to *Garcia*, Congress amended the FLSA to give state and local governments limited temporary relief from liability and to address certain additional concerns raised by public agencies. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-791. One of the 1985 amendments, codified at 29 U.S.C. 207(*o*), permits employees of state and local governments to receive, "in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required." 29 U.S.C. 207(*o*)(1).

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[1] In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that Congress lacks the power under the Commerce Clause to abrogate a State's sovereign immunity from suit in federal court. In *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), the Court held that sovereign immunity also protects a State from FLSA suits for money damages by private parties in state court. State sovereign immunity, however, "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 119 S. Ct. at 2267. Respondent Harris County has not argued that it is immune from suit in this case.

The Act attaches two conditions to the provision of compensatory time in lieu of overtime compensation. Congress specified that a public agency may provide compensatory time "only —

> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

29 U.S.C. 207(*o*)(2). In short, Congress specified that a public agency may award compensatory time (as opposed to overtime pay) *only* if it first secures an "agreement" or "understanding" to that effect with the affected employees, and only then if those employees have not individually exceeded the statutory limit on the hours of compensatory time they may accumulate. The applicable limit is 480 hours for "work in a public safety activity, an emergency response activity, or a seasonal activity," and 240 hours for any other work. 29 U.S.C. 207(*o*)(3)(A). An employee who reaches the applicable limit "shall, for additional overtime hours of work, be paid overtime compensation." *Ibid.*

If an employer chooses to reduce an employee's accrued compensatory time by paying for it, payment must be "at the regular rate earned by the employee at the time the employee receives such payment." 29

U.S.C. 207(*o*)(3)(B). An employee with accrued compensatory time is also entitled to be paid for it at specified rates upon termination of employment. 29 U.S.C. 207(*o*)(4). Finally, an employee who asks to use accrued compensatory time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. 207(*o*)(5).

b. The 1985 amendments direct the Secretary of Labor to "promulgate such regulations as may be required to implement [the] amendments." Pub. L. No. 99-150, § 6, 99 Stat. 790 (29 U.S.C. 203 note). The Secretary complied with that directive with respect to compensatory time by issuing the regulations codified at 29 C.F.R. 553.20-553.28. The regulations contemplate that compensatory time agreements may include "provisions governing the preservation, use, or cashing out of compensatory time." 29 C.F.R. 553.23(a)(2). Such provisions are valid so long as they are "consistent with section [207(*o*)]." *Ibid.* Otherwise, they are "superseded" by the statute. *Ibid.*[2]

The regulations further specify the circumstances under which a public agency will be found to have entered into a valid "agreement" or "understanding" with its employees concerning compensatory time. When employees do not have a recognized representative, an agreement or understanding with an

[2] For employees subject to Section 207(*o*)(2)(A)(ii) who were hired before April 15, 1986, "the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding." 29 U.S.C. 207(*o*)(2). For such employees, that "regular practice" must also conform to the provisions of Section 207(*o*). 29 C.F.R. 553.23(c)(2).

individual employee may "take the form of an express condition of employment," provided that the employee "knowingly and voluntarily agrees to it as a condition of employment" and is informed "that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section [207(*o*)]." 29 C.F.R. 553.23(c)(1). Moreover, "[a]n agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay," and such an agreement is "presumed to exist" with "any employee who fails to express to the employer an unwillingness to accept compensatory time," so long as the employee's acquiescence is free and uncoerced. *Ibid.*

2. a. Petitioners are deputy sheriffs employed by respondent Harris County, Texas. The County has individual agreements with petitioners under which they receive compensatory time for their overtime work. Pet. App. 29a-31a; *Moreau* v. *Klevenhagen*, 508 U.S. 22 (1993) (discussing Harris County arrangements). The premise of this Court's decision to grant certiorari is that those agreements (which are not in the record) are silent on whether the County may require petitioners to use their accrued compensatory time against their will. See note 4, *infra*; see also Pet. App. 12a.

In 1992, the County asked the Department of Labor for guidance on whether, consistent with the FLSA, it could adopt such a required-use policy. The Department responded:

> [A] public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if* the prior agreement *specifically* provides such a provision, and the employees have

> knowingly and voluntarily agreed to such provision freely and without coercion or pressure. See [29 C.F.R.] § 553.23(c). Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to *require* an employee to use accrued compensatory time.

Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100 (paragraph break omitted). The County Sheriff's Department nonetheless applies a required-use policy, which the parties to this case have summarized in a stipulation. See Pet. App. 29a-31a. Under that policy, "each Bureau Commander determines the maximum number of compensatory hours that may be maintained by employees in his or her bureau," based on "an assessment of the personnel requirements of the particular bureau." *Id.* at 29a-30a. Once an employee approaches the statutory maximum number of accrued hours, the employee "is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours." *Id.* at 30a. If the employee does not take steps to do so within a reasonable period, his or her supervisor "is authorized to order" the employee to reduce that number. *Ibid.* Although the Sheriff's Department tries to arrange mutually agreeable times for the employee to use the accumulated time, if no agreement is reached the supervisor may "direct[ ] the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau." *Ibid.*

b. In April 1994, petitioners filed a class action against the County and its Sheriff, alleging that respondents had violated Section 207(*o*) of the FLSA by, among other things, forcing petitioners to use their

compensatory time when they did not wish to do so. Pet. 4-5; see Pet. App. 3a.[3] In November 1996, the district court granted summary judgment to petitioners. Pet. App. 24a-27a. Following *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), the court reasoned that, under Section 207(*o*), compensatory "time off must be consumable by the worker on the worker's terms." Pet. App. 25a.

The court of appeals reversed. Pet. App. 1a-23a. After surveying the statutory scheme, the court concluded that the FLSA does not address whether, in the absence of a specific agreement on the issue, a public agency may require its employees to use compensatory time. *Id.* at 10a. The court observed that the question is squarely presented here, because the parties had not identified any relevant agreement governing the use of accrued compensatory time. *Id.* at 12a. Declining to speculate how Congress might have legislated had it considered the issue, the court decided to "devis[e] [its] own solution." *Id.* at 10a. It adopted a "default rule" that, unless the parties have specified otherwise, an employer may require its employees to use accrued compensatory time against their will. See *id.* at 10a-13a. That "default rule," the Court reasoned, is an appropriate application of "the general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary." *Id.* at 13a.

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[3] Petitioners raised, but ultimately abandoned, several other claims. The court of appeals concluded that it had appellate jurisdiction over this case even though the district court had not specifically ruled on those abandoned claims. As noted in our brief at the petition stage (at 6 n.4), the parties have not questioned that conclusion.

Judge Dennis dissented. Pet. App. 14a-23a. He agreed with the majority that the FLSA does not answer the question presented here, but he concluded that the Secretary of Labor's regulations do effectively answer that question in petitioners' favor and that the Secretary's position is entitled to deference. *Id.* at 18a. Judge Dennis would have remanded, however, for further factual development concerning whether or not the parties had entered into a lawful agreement specifically addressing the required-use issue. *Id.* at 19a-20a.

SUMMARY OF ARGUMENT

Federal law comprehensively governs any agreement between public employers and their employees on the subject of compensatory time. The question presented here is whether, when an employer and its employees agree to the provision of compensatory time in lieu of overtime pay as a general matter but do not specifically address the question of the employees' preservation and use of that time, the employer may require the employees to use the time against their wishes. The court of appeals answered that question in the employer's favor, reasoning that, in the absence of language in the agreement to the contrary, an employer has inherent authority to prescribe the rules for compensatory time, just as it has inherent authority to set the other conditions of employment.

That reasoning is unsound. By virtue of the FLSA, any authority an employer might have to adopt a compensatory time program now derives solely from the voluntary agreement of employees, not from any inherent power of the employer to prescribe the terms of employment. If employees withhold agreement, they retain an undisputed right to premium pay rather than compensatory time. Because any compensatory time

arrangement is a product of employee consent, it makes little sense to decide the question presented here against the interests of those without whose consent there would be no compensatory time program to begin with. Accordingly, where an agreement does not grant the employer control over the manner in which compensatory time will be used, the proper conclusion to be drawn from that silence is that the employees' compensatory time is generally theirs to use as they like, just as their overtime pay would have been theirs to spend as they liked had they refused compensatory time altogether.

That conclusion is correct even though, as a consequence, some employees may accrue so much compensatory time that they might someday reach the statutory maximum, beyond which additional overtime would have to be compensated in wages. Congress designated overtime pay as the preferred payment option in the absence of a contrary agreement, and it therefore entitled employees, if they so choose, to receive such pay for *all* of their overtime. An employee's greater power to reject compensatory time altogether includes a lesser power to agree to compensatory time subject to the possibility that, by operation of the FLSA, *some* overtime may someday need to be compensated in the form of wages.

The approach we advocate here would not impose a substantial prospective burden on public employers. Under *any* approach, an employer wishing to institute a compensatory-time program must first obtain the agreement of its employees; by regulation, many such agreements can be quite informal. Employers are well situated, at the same time they reach such an agreement, to seek to ensure that it specifically reflects any policy concerning the preservation and use of com-

pensatory time. To be sure, some employees who would agree to the substitution of compensatory time for overtime compensation might not wish to cede control over their use of that time. But their exercise of that choice would not leave employers worse off than if the employees had simply withheld consent to a compensatory-time arrangement to begin with. In the long term, our answer to the question presented here could disadvantage employers only in the sense that employees would make better informed decisions about the compensatory-time arrangements to which they have been asked to agree.

Finally, this Court does not write on a blank slate. The Secretary of Labor, in whom Congress has vested responsibility for implementation of Section 207(*o*), has addressed the question presented here and has answered it in favor of the affected employees. The Secretary's considered position is entitled to substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 461-463 (1997).

ARGUMENT

UNDER THE FLSA, A PUBLIC EMPLOYER MAY NOT REQUIRE AN EMPLOYEE TO USE ACCRUED COMPENSATORY TIME ABSENT A PREEXISTING AGREEMENT ON THE ISSUE

In holding that public agencies may unilaterally prescribe the terms on which their employees must use their compensatory time, the court of appeals invoked, as its "default rule," a "general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary." Pet. App. 13a. The court thus treated compensatory time as it might have treated holiday bonuses: in the court's view, so

long as no law or agreement directly forecloses a particular employment policy, an employer is free to adopt it. That approach might be appropriate if public agencies could base their authority to develop compensatory-time programs, like their authority to award holiday bonuses, on their inherent powers as employers to set the conditions of employment. Under the FLSA, however, whatever authority a public agency now has to adopt a compensatory-time program rests not on such inherent powers, but on the voluntary "agreement" of its employees to be subject to that program. As the Secretary of Labor has reasonably determined, the conclusion to be drawn from an agreement's silence on the question presented here should be resolved in favor of the employees without whose consent there would be no agreement, and no compensatory-time program, at all.

1. The FLSA establishes a general rule that an employer must pay its employees a cash premium for their overtime hours. The 1985 Amendments make a conditional exception to that rule for public agencies, but the conditions to that exception are crucial. In particular, the 1985 Amendments do *not* grant public agencies a unilateral right to provide compensatory time instead of overtime compensation to nonconsenting employees. Instead, they permit each public agency to seek an "agreement" or "understanding" with its employees—that is, a meeting of minds—on the subject of compensatory time. See p. 3, *supra*; *Black's Law Dictionary* 62, 1369 (5th ed. 1979). In the *absence* of such an agreement, a public agency has no authority whatsoever to adopt a compensatory-time program, and the agency must instead follow the rule applicable to all other employers covered by the FLSA: it must pay monetary compensation, at the premium rate, for

overtime. Any compensatory-time program is thus the product of employee consent. See *Moreau* v. *Klevenhagen*, 508 U.S. 22, 34 n.16 (1993); see also S. Rep. No. 159, 99th Cong., 1st Sess. 10-11 (1985); H.R. Rep. No. 331, 99th Cong., 1st Sess. 18 (1985).

The FLSA anticipates, and the Secretary of Labor's implementing regulations expressly provide, that compensatory time "agreements" will often be comprehensive in scope, encompassing not just a yes or no decision on whether compensatory time will be permitted at all, but also subsidiary provisions "governing the preservation, use, or cashing out of compensatory time." 29 C.F.R. 553.23(a)(2); accord S. Rep. No. 159, *supra*, at 11 (same); H.R. Rep. No. 331, *supra*, at 20 (same). An employer's authority to require employees to use their compensatory time when they would rather preserve it ranks among the most important issues concerning the "preservation" and "use" of compensatory time. The question presented in this case, which is integral to the implementation of this federal statutory scheme, is what to do when the parties have left that issue unaddressed in their agreement.[4]

That question should be answered in favor of the affected employees, as the Department of Labor has previously determined. See Opinion Letter from Wage

[4] This Court granted certiorari to address whether a public agency may require employees to use their accrued compensatory time "absent a preexisting agreement" permitting such compulsion. 120 S. Ct. 320 (1999); see also Pet. i (question presented); Pet. App. 12a-13a (deciding case on premise that parties had no agreement on that issue). As we observed in our amicus brief at the petition stage (at 18 n.12), respondents did not contend in their brief in opposition that the parties had in fact entered into any agreement that addresses this issue, and any such contention would now be waived. See Sup. Ct. R. 15.2.

& Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100 (discussed at pp. 5-6, *supra*); accord Br. of Sec'y of Labor as Amicus Curiae at 6-11, *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (5th Cir. 1998) (same). That conclusion is the natural consequence of Congress's decision to give employees the right to consent—or to withhold consent—to any substitution of compensatory time for overtime pay. When employees give up their right to premium pay, the proper inference from silence is that they will have broad discretion to use or preserve it as they wish, just as they would have enjoyed the right to save or spend their overtime pay as they wished had they not agreed to compensatory time to begin with.[5]

[5] See *Heaton*, 43 F.3d at 1180; see also 29 C.F.R. 531.35 ("wages" under FLSA must be "paid finally and unconditionally or 'free and clear' "); H.R. Rep. No. 331, *supra*, at 23 ("Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation."); S. Rep. No. 159, *supra*, at 10 (compensatory time is provided "in lieu of monetary compensation" and must be at the premium rate, "just as the monetary rate for overtime is calculated at the premium rate"). The Secretary recently returned to this issue in rejecting a regulatory proposal that would have given an employer a unilateral right to substitute an employee's accrued compensatory time for the employee's unpaid leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* The Secretary reasoned that, under the FLSA, compensatory time is "not a benefit provided by the employer. Rather, it is an alternative for paying public employees * * * for overtime hours worked. The public employee's 'comp time bank' is not the property of the employer to control, but rather belongs to the employee." 60 Fed. Reg. 2180, 2206-2207 (1995). Moreover, the Secretary noted, permitting an employer "to unilaterally *require* substitution would conflict with FLSA's rules on public employees' use of comp time only pursuant to an agreement or understanding * * * reached *before* the performance of the work." *Id.* at 2207.

That is so even though preserving employee discretion over the use of compensatory time could ultimately result in the employer's having to pay overtime compensation when it would have preferred to provide compensatory time, if the employee concerned reaches the statutory maximum number of compensatory-time hours that can be accrued. See 29 U.S.C. 207(*o*)(3)(A). Congress made employee consent a precondition to any compensatory time policy precisely because it recognized that many employees would prefer cash to compensatory time, and it therefore prescribed cash, rather than compensatory time, as the default payment option in the absence of a relevant agreement. Respondents' position would turn that statutory policy on its head, relying on the potential for cash payments (if and when the statutory maximum is reached) as an affirmative reason for divesting employees of control over their own compensatory time. See *Collins* v. *Lobdell*, 188 F.3d 1124, 1129-1130 (9th Cir. 1999), petitions for cert. pending, No. 99-592 (filed Oct. 5, 1999), and No. 99-788 (filed Nov. 5, 1999). That reasoning makes no sense within a statutory scheme in which employee consent is the *sine qua non* of compensatory time and in which compensation in cash is the default method of compensating employees for overtime work. Absent an agreement to the contrary, then, an employee's greater power to insist on monetary compensation for *all* overtime includes a lesser power to accrue compensatory time as he or she wishes, even though the employee may someday reach the statutory maximum and then receive monetary compensation for any further overtime work.[6]

[6] The Secretary of Labor's regulations implementing the FLSA permit employers to cash out an employee's accrued compensatory time by paying the monetary equivalent of what the employee would have earned for overtime in the absence of a compensatory time agreement. See 29 C.F.R. 553.27(a); see also 29 C.F.R. 553.26(a). (The FLSA itself does not squarely address that issue, although it does contemplate "cashing out" under at least some circumstances. See 29 U.S.C. 207(o)(3)(B).) The premise underlying that regulation is the same premise that underlies the Secretary's position here: Paying cash for overtime satisfies the general purposes of the FLSA, and compensatory time is the statutory exception to that policy rather than the rule. Certainly nothing in the Act or the regulations suggests that an employer may unilaterally reduce accrued compensatory time *without* paying for it.

Finally, and for similar reasons, it would make little sense to resolve this case by invoking, as the court of appeals did, a "default rule" that "the employer can set workplace rules" as it wishes. Pet. App. 13a. That "default rule" can have no logical application where, by statute, any authority an employer may have to adopt any compensatory time program derives not from the employer's own underlying power to set the terms of employment, but from employee consent. At all events, any uncertainty about the proper disposition of this case should be resolved by reference to the Secretary of Labor's reasonable regulations and interpretive guidance implementing the FLSA, not by judge-made "default rules"—especially default rules that conflict with those policies. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 461-463 (1997); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).[7]

[7] Several other exceptions to the FLSA's general overtime provisions are conditioned on the existence of an agreement or understanding between the employer and its employees before work is performed. See 29 U.S.C. 207(g) (piece rates), 207(j) (employment in hospital or similar institution), 207(n) (transit em-

2. Congress's decision to make employee consent a precondition to any compensatory-time policy is sufficient, by itself, to answer the question presented here in favor of the affected employees. Even apart from that consideration, however, other aspects of the statutory scheme independently confirm that Congress intended for employees, in the absence of a contrary agreement, to retain the general right to use or preserve their compensatory time as they choose.

First, Section 207(o) is not silent on the subject of an employer's authority with respect to an employee's use of compensatory time. Congress in fact addressed that subject and identified only one circumstance in which an employer may exercise some measure of control: when an employee requests the use of compensatory time, the employer must allow such use within a reasonable period of time except where the use would "unduly disrupt" the employer's operations. 29 U.S.C. 207(o)(5). If Congress had intended for employers to exercise unilateral control over the use of compensatory time in other respects as well, it presumably would have so provided. See generally *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The decision below, however, would entitle an employer not only to limit the circumstances in which an employee may choose to use his or her compensatory time, but also to compel the use of compensatory time against the employee's wishes. That construction of Section 207(o) would impermissibly "enlarge[] by implication" Section 207(o)'s exception to the general rule requiring pre-

ployees). Neither the Secretary's regulations nor, to our knowledge, the courts have applied to those provisions any "default rule" similar to the one adopted below. See, *e.g.*, 29 C.F.R. 548.200(a), 548.306(f), 548.401, 778.601(c).

mium pay for overtime. *Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 35 (1987); see *Moreau*, 508 U.S. at 33 (applying to Section 207(o) the "well-established rule that 'exemptions from the [FLSA] are to be narrowly construed'").

Moreover, the court of appeals' approach would eliminate much of the "freedom and flexibility enjoyed by public employees" (see H.R. Rep. No. 331, *supra*, at 20) that Congress enacted Section 207(o) to preserve. Congress permitted employees to agree to the provision of compensatory time rather than overtime pay on the premise that they could thereby enjoy otherwise unavailable opportunities to take extended vacations, get away from job stresses when necessary, care for relatives, and attend to other family or personal matters. See *Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 4, 71, 160, 205, 224-225 (1985); *Fair Labor Standards Amendments of 1985: Hearings on S. 1570 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 17, 96, 109-110, 275, 311, 321, 374-375, 492-493, 520, 573 (1985).[8] Con-

[8] See also 131 Cong. Rec. 28,987 (1985) (Sen. Kasten) ("This [legislation] will allow workers with erratic work periods more flexibility in meeting their needs."); *id.* at 29,224 (Rep. Martinez) ("[M]any employees * * * have actually come to prefer having comp time instead of overtime pay for those extra hours worked. To them, the extra time to spend on projects that benefit themselves, their homes, their future and their families, are more important than the cash they could earn."); *id.* at 29,225 (Rep. Gilman) ("[This legislation] allows workers the freedom to receive deserved compensation in the manner they prefer while reducing the compliance cost of [*Garcia*] for public employers. Many of the hard-working people employed by our State and local governments

ferring on employers a unilateral right to compel the use of compensatory time when employees would rather *not* use it could significantly impair the value of such time for many employees.

Finally, there is no merit to respondents' argument (Br. in Opp. 5-6, 9) that the policy at issue here is lawful on the theory that, by requiring an employee to use his or her compensatory time, the County is, in essence, simply shortening the employee's work week and cashing out the employee's accrued compensatory time (see note 6, *supra*). Respondents seek to "shorten" each affected employee's "work week" only sporadically and only as a transparent means of forcing the employee to consume accrued compensatory time. However characterized, this is a required-use policy, and it is unlawful because petitioners, without whose consent there would be no compensatory-time program at all, did not consent to the required use of their accrued time. This Court has invalidated similar attempts to elevate form over substance as a means of evading the FLSA's overtime requirements.[9]

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value their private time more than the overtime pay they could earn.").

[9] See, *e.g.*, *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, 430-431 (1945) (overtime pay must be based on a regular rate that takes into account incentive pay); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (overtime pay must be based on a regular rate that takes into account payments resulting from guaranteed piece rates); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 39-41 (1944) ("split-day plan" under which daily work hours are classified as either "regular" or "overtime" in order to perpetuate the pre-statutory wage scale violates the FLSA); see also 29 C.F.R. Pt. 778, Subpt. F (Pay Plans Which Circumvent the Act); *id.* § 553.224 (state or local government cannot change the length and starting time of work periods in order to evade the FLSA's overtime requirements); 6A Wage &

3. Answering the question presented here in petitioners' favor would impose only a very limited marginal burden on public employers. Because (as all agree) any public employer must bear the burden of securing an employee agreement before providing compensatory time in lieu of overtime pay, the employer is well positioned to seek an agreement that specifies the circumstances under which that employer may properly control the preservation or use of compensatory time. Of course, some employees who agree to the substitution of compensatory time for overtime pay as a general matter may not agree to cede to the employer control over their preservation or use of such time. But in that event a public employer is no worse off than it would be if those employees simply withheld consent to compensatory time altogether, as they are statutorily entitled to do. In the long term, the only respect in which the Secretary's position would disadvantage employers is that their employees will know in advance what to expect if they agree to an employer's compensatory-time program. But full disclosure is a virtue, not a vice, and the consequences of providing it are obviously no basis for resolving the issue presented here in favor of the parties that might benefit from the absence of full disclosure.[10]

Hour Man. (BNA) 99:5254 (Feb. 15, 1991) (although an employer may use compensatory-time provisions in conjunction with a time-off plan within a biweekly pay period, it may not pay a fixed salary for such fluctuating hours); H.R. Rep. No. 331, *supra*, at 22 ("The Committee expects good faith compliance by public employers and would direct the Secretary of Labor to enforce these amendments so as to prevent * * * attempts to evade Congressional intent.").

[10] Petitioners present no claim that the compensatory-time program described in the parties' stipulation violates any independent substantive policy of Section 207(*o*) or of the FLSA in

Even in the near term, the Secretary's position will impose little burden on employers that have already reached agreements with their employees without specifically addressing the question presented here. Where the employment relationship is governed by "applicable provisions of a collective bargaining agreement" or a similar arrangement, see 29 U.S.C. 207(*o*)(2)(A)(i), the employer is free to renegotiate the issue at the expiration of the current agreement (or even during its term if the agreement and applicable law allow).

Where, as in this case, the employment relationship is *not* characterized by collective bargaining with a designated labor representative, see *Moreau*, *supra*, the

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general, such that the program would be unlawful even if the employees had agreed to it. See generally *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (FLSA rights may not be waived); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 577-578 (1942) (explaining that one key goal of the FLSA is to reduce unemployment by giving employers an adequate incentive to hire additional workers). Securing an agreement with employees is a necessary, but not always sufficient, condition for the lawfulness of a compensatory-time policy, because such policies must also be consistent with the substantive terms of Section 207(*o*). See 29 C.F.R. 553.23(a)(2); 6A Wage & Hour Man. (BNA) 99:5212, 99:5213-99:5214 (July 29, 1988); Opinion letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100. A key factor in determining whether a required-use arrangement is substantively consistent with the statutory scheme is whether the arrangement preserves for employees sufficient "flexibility" (H.R. Rep. No. 331, *supra*, at 20) in deciding how to use their compensatory time. See pp. 17-18 and note 8, *supra* (discussing legislative history); see also 52 Fed. Reg. 2016 (1987) (rejecting suggestions "that the scheduling of compensatory time should be solely at the employer's discretion"). We see no reason why the sort of arrangement described in the parties' stipulation could not be administered to afford that flexibility.

employer need only reach an "agreement or understanding" with the affected employee "before the performance of the work." 29 U.S.C. 207(*o*)(2)(A)(ii). By regulation, such an "agreement or understanding" can be quite informal. See 29 C.F.R. 553.23(c). For example, it "may take the form of an express condition of employment," provided that the employee knowingly and voluntarily agrees to it and is informed that his compensatory time "may be preserved, used or cashed out consistent with the provisions" of Section 207(*o*). 29 C.F.R. 553.23(c); accord S. Rep. No. 159, *supra*, at 11 (same); H.R. Rep. No. 331, *supra*, at 20 (same). And an agreement or understanding "may be evidenced by a notice to the employee," so long as the employee registers no objection and his or her decision to acquiesce is free and uncoerced. 29 C.F.R. 553.23(c). Just as those procedures provide simple and informal methods for seeking employee consent to the substitution of compensatory time for overtime pay as a general matter, so too do they provide an equally unburdensome means of seeking employee consent to an employer's proposal to afford the employer some control over the employee's preservation or use of accrued compensatory time.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1999

(5)

No. 98-1167

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

EDWARD CHRISTENSEN, ET AL.
Petitioners,

v.

HARRIS COUNTY, TEXAS, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO") and its 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of the Petitioners, Edward Christensen and 127 other deputy sheriffs in Harris County, Texas.[1] NAPO seeks to reverse the judgment of the Fifth Circuit Court of Appeals, which reversed the District Court's judgment for the Petitioners. The trial court ruled that the Respondents violated the Petitioners' rights under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, relying on the Eighth Circuit Court of Appeals' decision in *Heaton v. Moore*.[2]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through education, legislation, and advocacy of the fundamental due process and workplace rights of officers. NAPO represents 4,000 law enforcement organizations, with 250,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel), and 11,000 retired officers. In Texas and Louisiana, two of the states covered by the Fifth Circuit, NAPO represents the Combined Law Enforcement Association of Texas, the Dallas Police Association, the Police Association of New Orleans, and the Police Association, City of Kenner, LA, which altogether have a total of 30,500 sworn law enforcement officers as members.

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

[2]The court's decision is reported in 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schiriou v. Heaton*, 515 U.S. 1104 (1995).

NAPO's members have a significant interest in the important issues of law before this Court, as the impact of the Court's decision will affect law enforcement officers across the nation. This is because § 7 of the FLSA obligates public employers to compensate their employees for hours worked in excess of 40 hours per week, at premium rates, with either cash payment or compensatory time ("comp time"), subject to limitations.[3] 29 U.S.C. § 207. Consequently, law enforcement officers, as public employees, are entitled to overtime pay under the special provisions that apply to such employees. 29 U.S.C. § 207(k). NAPO seeks to ensure that the comp time earned by law enforcement officers, in lieu of overtime pay, belongs to the officer as a condition of employment for the officer's use and control, as the officer sees fit, and that its use is not governed by the unilateral dictates of the public employer, absent an express agreement giving the employer such control prior to the accrual of the comp time. Law enforcement officers are ready on short notice to place their life in harm's way to protect others. They must not have their compensatory time severely restricted and controlled by their employers, because such action violates both the spirit and the letter of the FLSA, as well as penalizes those officers who make personal sacrifices in order to work extra hours when their departments need their services the most.

WRITTEN CONSENT OF THE PARTIES

Counsel of record for both the Petitioners and the Respondents consented in writing to the filing of this *amicus curiae* brief, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition

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[3]FLSA limits the maximum number of comp time hours an employee can accrue. 29 U.S.C. § 207(o)(A).

for writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

The Harris County (TX) Sheriff's Department has established a policy under which each employee's accrued compensatory time is kept below a certain level, 240 allowable hours, in light of the directives set forth by the 1985 Amendments to the Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. § 207(o) (Harris County's maximum is well below the statutory limitation of 480 maximum hours set by the FLSA, § 207(o)(3)(A).) In accordance with this policy, if any Harris County Sheriff's Department officer nears this maximum number of hours, the officer is asked to voluntarily use up some of the compensatory time by taking days off from work. The Sheriff's Department attempts to arrange a mutually agreeable time for the employee to use the hours, but if an agreement cannot be reached, or if the employee does not promptly try to use up the time, the employee is ordered to use the hours at a time that is most convenient to the department. If the employee is dissatisfied with such order, he or she may informally complain within the department hierarchy. The parties involved have stipulated to these facts concerning the County's policy.

In the instant case, the Petitioners are deputy sheriffs who were denied permission to use their accumulated compensatory time when they requested it, and who were forced to take time off when they did not want to--all despite the fact that they had not accumulated even half of the maximum number of hours allowed under the FLSA. Consequently, in April 1994, the deputy sheriff Petitioners brought this suit against Respondents Harris County and Sheriff Tommy B. Thomas, alleging violations of Section 207(o) of the FLSA.

In November 1996, the District Court for the Southern District of Texas found that the Respondent, Harris County, Texas, had violated the FLSA in adopting a policy which forced county sheriff's deputies, against their wishes, to use their

accumulated compensatory time when their balances approached this 240 hour maximum, stating that "accumulated time credits cannot be managed differently than salary; employees have a right to use it when they choose." *Moreau v. Harris County,* 945 F.Supp. 1067, 1068 (1996). The district court entered a "final judgment" in July 1997, which stated that the County "may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act." Subsequently, the Court of Appeals for the Fifth Circuit reversed, declaring that the County could lawfully require its employees to use their compensatory time sooner than they preferred. *Moreau v. Harris County,* 158 F.3d 241 (1998).

SUMMARY OF ARGUMENT

I

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, was enacted to protect employees from the exploitive practices of their employers. Specifically, § 207(o) works to guarantee an employee's right to control the use of his or her compensatory time, subject only to a limited "undue disruption" exception, unless an express agreement between the employee and the employer contains contrary language giving such control to the employer. Consequently, the Fifth Circuit's decision granting the public employer Respondents the absolute power to unilaterally force employees to take comp time, regardless of the employee's needs or wishes and absent such an agreement, conflicts with the text and the intent of the statute.

First, the Fifth Circuit's decision in this case disregarded principles of statutory interpretation and substituted its own opinion in an exercise of excessive judicial activism. The Court of Appeal's reliance upon arguably relevant judicial precedent as a means of statutory interpretation is questionable and resulted in a misapplication of the statute. Consequently, the appellate court ignored the plain meaning of the words in § 207, which leave no

room for either the employee or the employer to dictate to the other party when comp time will be taken. Indeed, the statute affords a definite and reasonable procedure by which an employee may use his accrued comp-time, the existence of which strongly implies that the Congress had no intent of allowing employers to control an employee's use of comp time, absent an uncoerced and voluntary agreement between the parties. Under the interpretative doctrine of *expressio unius*, the positive implies the negative, and the words omitted from a statute may be just as significant as words set forth. Thus, by excluding any other method whereby an employer may exercise some form of control over an employee's use of comp time, Congress deliberately refused to vest employers with such authority.

Second, the Fifth Circuit failed to examine the legislative history behind the 1985 amendments, which provide for comp time, and disregarded the compromise Congress designed in balancing competing interests. In 1985, Congress decided to give public agencies the option of compensating employees with time off, in lieu of cash payment for overtime work. Congress did this in an effort to ease the financial burden on public employers' of paying overtime wages and to provide some flexibility for employers, while still guaranteeing that employees receive their full recompense, to use as they see fit, unless to do so would disrupt the agency's operations.

If adopted by this Court, the Fifth Circuit's contrary interpretation of section § 207(o) would upset Congress' careful balancing of interests reflected in the 1985 amendments, and would nullify the overall purpose of the FLSA. Indeed, to view the statute as endowing employers with more and greater benefits than the statute explicitly provides would seriously undermine the employer/employee balance that Congress sought to achieve with the FLSA, and constitutes nothing less than a rewriting of the statute, an excessive exercise of judicial activism. Consequently, any forced use of comp time deviates from Congress' intent, because employees are ordered to use comp time to their

disadvantage, rather than making "beneficial use" of it.

II

To the extent that the FLSA is deemed to be silent on the issue before this Court, the Secretary of Labor's pronouncements on this issue must be given great deference. As this Court has stated in *Auer v. Robbins*, *infra*, "[Courts] must sustain the Secretary [of Labor's] approach so long as it is 'based on a permissible construction of the statute.' "

The Department of Labor has addressed the issue before this Court through regulation, an advisory opinion, and through a statement in a regulation. The Department takes the following position: First, a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if* a prior agreement specifically provides such a provision and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure, but that *absent such an agreement*, neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time. Second, comp time is not a form of accrued pay, nor is it a benefit provided by the employer. Rather, it is an alternative form for paying public employees for overtime hours worked. Third, accordingly, a public employee's comp time "bank" is not the property of the employer to control, but rather belongs to the employee, and comp time is an "inferior substitute" for cash; as such, it follows that an employee's use of such comp time should be allowed freely, because the diminished value of the comp time would be even greater, were the employee forced to use it against his or her wishes.

Hence, the Fifth Circuit's interpretation of § 207 conflicts with the Secretary of Labor's interpretation. The conflict occurs because employers, by unilaterally forcing public employees to use comp time, are able to avoid paying overtime wages indefinitely and to otherwise diminish the value of the comp time.

III

Section 207(o) both creates a new property right and, separately, secures the innate property rights already held by public employees, while giving both employers and employees limited freedom to negotiate certain aspects of overtime compensation. Congress and the Department of Labor unquestionably believe that employees have a property right in the fruits of their labor, be it cash or comp time, based on legislative history and Labor Department statements. Indeed, as the Eighth Circuit in *Heaton v. Moore*, *infra*, recognized, the accrued comp time belongs to the employee, and if not used, is paid to the employee in cash upon termination of employment.

In response to an E-mail solicitation through law enforcement-related Internet web sites, a*micus curiae* NAPO received comments from law enforcement officers themselves to determine the practices of Police Departments and the use of comp time. This information confirms law enforcement officers' expectations that compensatory time is a property right, the decision on use of which belongs to the employee, not the employer, subject to the limited "undue disruption" exception. Often comp time is provided to the officer, in lieu of overtime pay, for hours inconveniently worked often after an officer has already served one shift, done at the request or direction of the employer. As one Texas law enforcement officer told NAPO: "Compensatory time isn't worth a tinker's shoenail unless an officer can take it when he needs it. The whole idea of forced comp time usage is [sic] to save money for the employer. ... Forcing usage of comp time denies the employee a basic right, the right to use his own property in the legal and reasonable way he chooses." *Infra*.

Since an employee undeniably has a property interest in his accrued comp time, he or she cannot be deprived of that property interest without due process of law. Forcing an employee to take his or her comp time when he or she does not want to, is

depriving that individual of the full use and enjoyment of that property, causing a diminution in the value of the employee's comp time. Therefore, the Fifth Circuit's interpretation may well undermine the constitutionality of the Respondents' application of § 207(o) statute on due process grounds.

While this issue is not now before the Court, the consequences of affirming the Fifth Circuit's decision and the practice followed in Harris County, Texas, could open the "floodgate" to public employee challenges, on due process grounds, of agency actions retroactively limiting the employee's use of comp time through agency directives ordering its use, under the analysis of this Court's 1998 decision in *Eastern Enterprises v. Apfel*, *infra*, and cases cited therein. In sum, it would also seriously interfere with the employee's property right in the comp time, with serious constitutional implications.

ARGUMENT

I. A reasonable statutory interpretation of the Fair Labor Standards Act, 29 U.S.C. § 207(a), supports the position that public employees exclusively control their compensatory time, with a very limited "undue-disruption-of-agency-operations" exception, absent an express agreement between the employee and the employer which overrides that exclusive control. The Fifth Circuit Court of Appeals seriously erred in its textural interpretation of the statute, in holding that the FLSA does not prohibit employers from forcing employees to take comp time.

I

The issue presented in the instant case centers around the Fifth Circuit's interpretation of § 207(o) of the FLSA.

In the Court of Appeals, the Respondents argued that the legislative purpose of the FLSA was best served by allowing

employers to unilaterally order reductions in an employee's comp time and to set the conditions for achieving those reductions. *Moreau*, 158 F.3d at 245. The appellate court agreed and declared that the FLSA does "not grant public employees a right to choose when they will use accrued comp time." The court found that § 207(o) is inapplicable to Harris County's policy, because this provision, first, is only triggered when an employee first requests the use of their accrued comp time, and, second, does not address whether a public employer may control an employee's accrual of comp time. The court stated, "Congress did not consider or resolve the question that we face here ... it is impossible to determine how Congress would have legislated had it confronted the question", therefore, "before devising our own solution, we must of course look to precedent." *Moreau*, 158 F.3d at 245-46. The Court of Appeal's reliance upon judicial precedent as a primary means of statutory interpretation is questionable, and resulted in a misapplication of the statute with consequences reaching beyond the statute's intended boundaries.

The ruling by the Fifth Circuit is unsupported by the legislative purpose and terms of the FLSA provision at issue. Rather, an interpretation of 29 U.S.C. § 207(o) conferring on public employees, not their employers, the right to control the use of their comp time absent an express agreement, is consistent with FLSA's provisions and obvious purpose, and is in accordance with the intentions of its drafters, as discussed below. As this Court has stated, "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982) (quoting *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940)).

Congress enacted the FLSA in order to curtail the existence of labor conditions that it believed were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers...", 29

U.S.C. § 202, not to protect employers from being the victims of abusive workers. *Moreau,* 945 F.Supp. at 1068. With this purpose in mind, Congress addressed several labor issues, including those related to setting a maximum forty hour workweek. 29 U.S.C. § 207. One such provision is the FLSA's requirement that employers pay employees one and one-half times their regular rate of pay for every hour that the employee works over forty hours. 29 U.S.C. § 207(a)(1).

In 1985, as a result of this Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), state and municipal governments became fearful that compliance with the FLSA would cause serious financial hardship.[4] In response, Congress decided to give public agencies the option of compensating employees with time off, in lieu of cash payment for overtime work. Congress did this in an effort to ease the financial burden on employers' payment of overtime wages, while still guaranteeing that employees receive full recompense.[5]

Hence, after this 1985 amendment to the FLSA, an employer could compensate an employee with overtime pay, or alternatively, subject to an agreement between the employer and the employee,[6] with comp time at a rate not less than one and one-

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[4]See 131 Cong. Rec. E4909-01 (1985) (statement of Rep. AuCoin) and 131 Cong. Rec. E5121-02 (1985) (statement of Rep. Frenzel).

[5]131 Cong. Rec. E4538-03 (1985) (statement of Rep. Murphy) and 131 Cong. Rec. E4897-02 (1985) (statement of Rep. Franklin).

[6]"Compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. This agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section [20]7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o)." 29 C.F.R. 553.23(a).

half hours for each hour of employment for which the overtime compensation is required, 29 U.S.C. § 207(o)(1), up to a maximum limit of either 240 or 480 hours depending on the type of work the employee does. (For public safety workers, including the Petitioners in this case, the maximum is 480 hours.) If an employee reaches his or her maximum accrual limit, the employer can no longer compensate the employee with comp time for working overtime, but must compensate the employee by payment of overtime wages, 29 U.S.C. § 207(o)(3)(A), thus giving employers an incentive to keep employees compensatory hours under the maximum limit allowed by law.

If an employer desires to unilaterally reduce an employee's level of comp time, the FLSA allows the employer to make cash payment to the employee, calculated at the employee's current regular rate of pay. 29 U.S.C. § 207(3)(B). If an employee desires to use their comp time, FLSA provides that:

> An employee of a public agency ... - (A) who has accrued compensatory time off [under the provisions of the FLSA], and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5). The use of comp time depends on the satisfaction of two conditions. First, the employee must have accrued compensatory time off, and, second, the employee must request his or her employer's permission to use such compensatory time. Once these conditions are satisfied, the plain language of the statute dictates that the employee "shall be permitted by the employee's employer to use such time within a reasonable period after making the request" if there is no undue disruption to the agency's operations on the day(s) involved. Given their plain meaning, the words chosen by Congress leave

no room for either the employee or the employer to dictate to the other party when comp time will be taken, but require a mutually beneficial agreement to be struck.[7] Compare with the analysis in *Griffin,* 458 U.S. 564.

Indeed, the statute affords a definite and reasonable procedure by which an employee may use his accrued comp-time. The existence of such a procedure strongly implies that Congress had no intent of including provisions not listed or embraced. Indeed, under the interpretative doctrine of *expressio unius*, the positive implies the negative; the words omitted from a statute may be just as significant as words set forth, in that the legislature had no intent of including things not listed or embraced.[8] As this Court stated in *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871), "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."

In *Heaton v. Moore*, 43 F.3d 1176 (1994), *cert. denied sub nom., Schiriou v. Heaton*, 515 U.S. 1104 (1995), the Eighth Circuit reached the same conclusion on this precise issue. There, the court stated:

> In other words, where Congress has specified in the statute the circumstances under which a public employer may exercise unilateral control over accrued compensatory time, other unilateral methods not provided for in the statute are not allowed under the statute. We conclude that Congress has limited the public employer's control over an employee's use of compensatory time only to situations where an employee's requested use of compensatory time would be "unduly disruptive" to the public employer's operations. Any further attempt by a public employer to unilaterally exercise authority over how the employee uses the employee's accrued compensatory time is inconsistent with section 207(o)(5).

43 F.3d at 1180.

Thus, Congress excluded any other method under which employers may unilaterally reduce employee comp time levels, when it enacted FLSA provisions which explicitly 1) allow public employers to unilaterally reduce employees' level of comp time hours by way of cash payments;[9] and 2) govern employees' use of comp time. Because Congress set forth directives which are clear and easily understood, there is no ambiguity. And, as this Court has stated, "[the Court's] task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin,* 458 U.S. at 570 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

To interpret the statute otherwise, as allowing employers to force employees to use comp time when they do not want to, because the plain language of the FLSA does not specifically

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[7]"The committee has sought to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations." House Report 99-331, 99th Cong. 1st Sess. 10 (1985). See also 131 Cong. Rec. E4538-03 (1985) (statement of Rep. Murphy) (stating that "[t]his bill is a compromise solution.") and 131 Cong. Rec. E4909-01(1985) (statement of Rep. AuCoin) (stating "I believe that Congress has tackled a complex and controversial issue and come up with a workable compromise.").

[8]William N. Eskridge, Jr. and Philip P. Fricky, Cases and Materials on Legislation Statutes and the Creation of Public Policy 638 (West Publishing Co. 2d ed. 1995) 1988.

[9]29 C.F.R. 553.26(a) states: "Overtime compensation due under section 7 [29 U.S.C. § 207] may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or in part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweek or work periods."

prohibit public employers from requiring employees to use comp time, is akin to saying that an employer, after making a cash payment to an employee in exchange for comp time, can dictate how the employee will spend the money, because the plain language of FLSA does not specifically prohibit such action by employers. Such an interpretation is inconsistent with the rest of the text, conflicts with provisions in the statute,[10] defies the intentions of the statute's drafters, and produces a result that is nothing less than absurd, because Congress simply "did not write the statute that way." *United States v. Naftlalin*, 441 U.S. 768, 773 (1979). Were the Fifth Circuit's reasoning in this case to be accepted, just imagine for a moment the implications; every time the Congress wrote a statute stating specific provisions for approved or allowable actions, it would also be required to list every possible prohibited action. Such a notion is inconceivable and would wreak havoc if accepted by this Court!

The legislative history surrounding the 1985 amendments to the FLSA supports NAPO's argument. To protect public employees, the FLSA imposes liability upon employers that exploit workers by violating the reasonable procedures that Congress set forth governing the use of comp time. Indeed, Congress clearly foresaw the potential for public employers, motivated by a desire to save money, to abuse the FLSA's comp time option in lieu of paying overtime wages.[11] That is why Congress set maximum accrual limits for comp time and included an explicit provision governing its use. This was to prevent

[10]As this Court has stated, "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.' (citing from Brown v. Duchesne, 19 How. 183, 194, 15 L.Ed. 595 (1857))." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

[11]See House Report No. 99-331, *supra* note 7, reprinted in Appendix F, 68a, to the Petition for a Writ of Certiorari in this case.

employers from "indefinitely replac[ing] monetary overtime compensation with compensatory time, undoubtedly an inferior substitute for cash", *Moreau*, 945 F.Supp. at 1068. In reporting the 1985 amendments, the Education and Labor Committee of the House of Representatives stated:

> The Committee is very concerned that public employees in office with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation.

House Report No. 99-331, *supra* note 7, at 14. Consequently, any forced use of comp time deviates from Congress' intent, because under such forced use, employees must use comp time to their disadvantage, rather than make beneficial use of it.

In *Local 889, American Federation of State, County, and Municipal Employees, Council 17 v. State of Louisiana*, 145 F.3d 280 (5th Cir. 1998) (quoting *AFSCME v. Louisiana*, No. 90-4389 (E.D. La. Jan. 12, 1996), the Fifth Circuit indicated that, first, the purpose of the 1985 amendment to the FLSA would be greatly impeded if employees were allowed to "bank" their compensatory time and "force" their public employers to pay cash overtime, and second, that such an interpretation of § 207 of FLSA would "upset

the delicate balance reached by Congress when it created 207(o) in 1985," and "practically nullify the purpose of the statutory scheme".

However, just the opposite is true. To view the statute as endowing employers with more and greater benefits than the statute explicitly provides would seriously undermine the employer/employee balance that Congress sought to achieve with the 1985 amendments, and constitutes nothing less than a rewriting of the statute, an exercise of judicial activism. If employers are able to force employees to use comp time, where is that careful balance that Congress reached? The answer is simple, it is gone. If, however, employers must grant employee requests for use of comp time, unless such use causes undue hardship, the balance is secure.

The compromises incorporated in § 207(o) are carried out in several ways, for the benefit of the employer, as well as the employee. The public employer benefits from the comp time provision in the following ways: First, every time an employee is directed to work overtime for the benefit of the employer, that fills a gap in the agency's operations and through use of comp time, the agency does not have to hire as many full-time workers. Second, if the employee takes time off from work voluntarily to use the comp time, then the employer does not have to pay out the cash, reducing its actual cash outlays, one of the reasons for this alternative. But even if the employee "banks" all of his comp time, the employer benefits because they are able to defer the payment of a substantial amount of wages, sometimes for many years, all at the employer's option.

The Eighth Circuit in *Heaton* addressed the employer's "woe-is-me" argument and made clear that it is the employer which has the option to grant compensatory time in the first place. As the court there stated:

> The defendants have argued at length that if they

> cannot force employees to use their compensatory time balances at some point, they will have no way of controlling employee's compensatory time balances. Again, we must disagree. Employers retain the ability to control any such problem from the front end. Employers are free to schedule less overtime and/or hire more corrections officers to reduce the need for compensatory time. As we have previously observed, "[a] fundamental purpose of the Fair Labor Standards Act was to encourage employers to distribute work among a larger number of employees rather than to work employees overtime."

43 F.3d at 1181 (quoting *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444, 446 (8th Cir. 1978)).

In a recent case, the Court of Appeals for the Ninth Circuit, relying on the Fifth Circuit's ruling in this case, stated:

> We do not suggest that the FLSA requires that public employers be allowed to force employees to use comp time... [B]oth legislative history and the interpretive regulations suggest that employers and employees should reach agreements concerning the use and preservation of comp time.

Collins v. Lobdell, 188 F.3d 1124, 1128 (1999) (citing 1985 U.S.C.C.A.N. at 659 and 29 C.F.R. 553.23(a)). (Inexplicably, however, the Ninth Circuit went on to hold that "FLSA does not prohibit public employers from requiring employees to use comp time". *Id.* at 1129.)

Consequently, 29 U.S.C. § 207(o)(5) mandates that employers must allow employees to reap the full reward of their labor by granting employees' comp time requests, subject only to the one limited exception, and leaves no room for either party to absolutely dictate to the other when the comp time will be used.

Therefore, any forced use of comp time deviates from Congress' intent, as embodied in the statute.

II. Alternatively, to the extent that this Court determines that the Fair Labor Standards Act, 29 U.S.C. § 207(a), does not support the statutory interpretation urged by *amicus curiae*, because the provision is deemed to be silent on the issue of control of a public employees' compensatory time, then this Court should sustain the Secretary of Labor's approach, as reflected in its interpretations, because it is based on a permissible and reasonable construction of the statute.

To the extent that FLSA is deemed to be silent on the issue before this Court, the Secretary of Labor's pronouncements on this issue must be given great deference. As this Court has stated, "[Courts] *must* sustain the Secretary [of Labor's] approach so long as it is 'based on a permissible construction of the statute.'" *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (emphasis added).

The Department of Labor has addressed this issue. First, the Department promulgated a regulation which embodied the congressional intent (discussed previously), as follows:

> Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the *right* to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

29 C.F.R. 553.25(b), (emphasis added).

In 1992, the Department (through the Acting Administrator of the Wage and Hour Division) also issued an advisory opinion

to a public employer on this issue, which stated:

> You ask whether a public agency may require its nonexempt employees to use their previously accrued FLSA compensatory time by scheduling them to take such time off as directed.
>
> As you know, FLSA compensatory time off is paid time off which is earned and accrued by an employee in lieu of immediate cash payment for statutory overtime hours. As a condition for use of compensatory time in lieu of overtime payment in cash, an agreement or understanding may be reached prior to performance of that work. That agreement or understanding may include provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with §7(o). See § 553.23 of Regulations, 29 C.F.R. Part 553.
>
> Thus, it is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if the prior agreement specifically provides such a provision, and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure*. See § 553.23(c).
>
> Absent such an agreement, *it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time*. However, as indicated in §553.27, accrued compensatory time may be paid in cash at any time. It appears that "cashing out" accrued compensatory time could achieve the objective of concern.

Opinion Letter, September 14, 1992, Karen R. Keesling, Wage and Hour Division, U.S. Department of Labor, 1992 WL 845100

(emphasis added).[12]

Because comp time is an inferior substitute for cash, the Department of Labor's regulations require that an employee's decision to accept compensatory time off in lieu of cash overtime payment must be made freely and without coercion or pressure. 29 C.F.R. § 553.23(c)(1). As such, it follows that an employee's use of such comp time should also be made freely without coercion, because the diminished value of the comp time would be even greater were that not the case.

In addition, in its commentary on its final rule on the Family and Medical Leave Act of 1993 (29 U.S.C. 2601, *et seq.*), the Department of Labor referenced the interplay of comp time with the FMLA. In response to suggestions by public agencies that use of comp time be required for FMLA leave, the Department stated its views on required use of comp time, as follows:

> The use of compensatory time off is severely restricted under the [FLSA] in ways that are incompatible with FMLA's substitution provisions. First, "comp" time is not a form of accrued paid leave mentioned in the FMLA or legislative history for purposes of substitution. It is also not a benefit provided by the employer. Rather, it is an alternative form for paying public employees (only) for overtime hours worked. The public employee's "comp time bank" is not the property of the employer to control, but rather belongs to the employee. If a public employee terminates employment, any unused comp time must be "cashed out." Thus, FMLA's provisions allowing an employer to unilaterally require substitution would conflict with FLSA's rule on public employees' use of comp time only pursuant to an agreement or

[12] *Amicus curiae* has learned from the Petitioners' counsel that ironically, the employer in this case was Harris County, Texas.

> understanding between the employer and the employee (or the employee's representative) reached before the performance of the work. ...

The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2206-07, January 6, 1995.

Thus, the Fifth Circuit's decision in this case directly conflicts with the Department of Labor's regulation, advisory opinion, and Federal Register statement.

III. Public employees, including law enforcement officers, have an inherent property right in their compensatory time, and as such are entitled to nothing less than the full benefit of their labor. Under 29 U.S.C. § 207(o), compensatory time earned by a public employee is a property right belonging to that employee, because requiring employees to work overtime and be paid or given compensatory time in lieu of time off is a condition of employment and not a benefit. Being arbitrarily ordered to reduce compensatory time is a retroactive deprivation of this property right, analogous to an employee being ordered by the public agency to spend the employee's pay on certain items. Besides disrupting the employee's life, such a retroactive deprivation implicates fundamental rights of fairness and due process under the Constitution, which could result in much public employee litigation if the Court affirms the Fifth Circuit's decision.

I

In this case, the Fifth Circuit held that employees do not have a property right in their comp time. *Moreau,* 158 F.3d at 246. *Amicus curiae* asserts that section 207(o) both creates a new property right and, separately, secures the innate property rights already held by the employee, while giving both employer and employee limited freedom to negotiate certain aspects of overtime compensation. Indeed, as philosopher John Locke stated:

> Though the earth and all inferior creatures be common to all men, yet every man has a property right in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say are properly his.[13]

The right to reap the fruits of one's own labor, be it produce from the earth or salary from the employer, is an undeniable property right. Hence, the appellate court's decision in the instant case not only errs in its interpretation and application of the statute, but also potentially creates constitutional problems.

Congress and the Department of Labor unquestionably believe that an employee has a property right in the fruits of their labor, be it cash or comp time. Legislative history proves this point: "Regardless of the number of hours accrued, the employee has the *right* to be paid for or use accrued compensatory time subject to this subsection." House Report 99-331, *supra* note 7, 13. "The *right* to be paid arises no later than the time of termination of employment." *Id.* at 14. DOL regulations also indicate that the employee has a *right* to use their comp time by stating that "the employee also has the *right* to use some or all of their accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations.", 29 C.F.R. 553.25 (emphasis added), and further, that the employee must receive the full value of wages:

> Wages, whether in cash or in facilities, cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." ...

29 C.F.R. 531.35.

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[13]John Locke, *The Second Treatise of Civil Government*, in The Great Political Theories 340 (Michael Curtis ed., Discuss Books 1973).

Indeed, as the Eighth Circuit in *Heaton* recognized, the accrued comp time belongs to the employee, and if not used, is paid to the employee in cash upon termination of employment.

> As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the bank compensatory time as the employee chooses, subject only that the employee not "unduly disrupt" the public employer's operations in doing so.

43 F.3d at 1180.

II

In preparing for this brief, NAPO solicited information from attorneys representing police officers and their labor organizations and from law enforcement officers themselves (done through the Internet and two law enforcement officer-related web sites). We received a number of comments, including information confirming these officers expectations that compensatory time is a property right, the decision on use of which belongs to the to the employee, not the employer, subject to the limited "undue disruption" exception. We also received information on how prone public employers in Texas are to skirt compliance with the FLSA, if not violate it. Of relevance to the instant case, however, are the following comments received from law enforcement officers in Texas, used with their express permission.[14]

A deputy sheriff from Kendall County, Texas, told us in a November 3, 1999 E-mail, "I have acquired 480 hours on numerous occasions and have been forced to use 80 hours at a

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[14]The E-mails referenced were received at NAPO's Washington, DC, office, and are on file and available for review by the parties in this case, with names redacted to protect identities.

time when it was not of use to me ..." Also, on November 3rd, a Port Arthur (TX) Police Department officer wrote:

> Compensatory time isn't worth a tinker's shoenail unless an officer can take it when he needs it. The whole idea of forced comp time usage is [sic] to save money for the employer. First, they give you comp time instead of paying overtime to fill a shortage. Then, when it will not create a shortage, they force you to take the time off. You might as well be a temporary employee.
>
> Forcing usage of comp time denies the employee a basic right, the right to use his own property in the legal and reasonable way he chooses.
>
> An employee works in exchange for compensatory time. Once that time is given to an employee, it becomes his property just like the payroll dollars he earns. If an employer has the authority to force him to use his time against his wishes, then the employer also has the same authority to force the employee to use vacation or money against an employee's wishes and best interest.
>
> ...
>
> Our position is that each of these leave types is provided to us as a condition of employment. These are not gifts but rather are earned for work. They are real property and when used in a reasonable and legal way constitute the same hours as regular payroll hours.[15]

On November 3, an officer with the Houston (TX) Police

[15]The officer in this E-mail is facing a different problem, not being allowed to take accrued time when the officer desires, which is still an issue of control. He wrote, "Our department does not force comp time usage. We have the opposite problem. Comp time accrues [sic] during shortages. Once earned, employees are denied usage of the time because of the same shortages that allowed them to earn it. Most of them now option for overtime wages instead because they can't take the time off."

Department, wrote, as follows:

> We used to have a policy of you could only hold your time for a year, then you had to use it. I was ordered to take off several times back then ('91-'92). They no longer do that however, ...
>
> In terms of being forced to use the time, I feel like we receive the time as a benefit and should be able to use it how and when we want (or its value as a benefit greatly diminishes). They don't tell us we have to use our medical insurance on a certain date that is convenient to the department or that we can only retire when it is convenient to them, and they should not be able to tell us when we can use our accrued overtime. When the weather starts to cool off and the number of calls start to drop, the agency could in effect furlough officers for several weeks at a time. I know I have approximately [several] months of time built up (comp, vacation, holidays, etc.) and would not want the city to tell me to take off from now until Christmas, work through New Year's, then back in March. This would seem to penalize the officers who accrue the most time (which, coincidentally, would most likely be the officers making the most arrests and working late processing them then later attending court).
>
> In the specific case you are talking about, I also find it unbelievable that the individual division commanders can set (and change) the accrual limits whenever and why ever they see fit. ...

In a second E-mail, when asked if his comments could be used in this brief, this Houston P.D. officer wrote:

> I hope I can help the [Harris County Sheriff's] deputies out. If they lose, there's no telling what our chief (who works only a few blocks from their sheriff) will do to us. ...

On November 4, 1999, a Harris County (TX) deputy sheriff (not a party to this lawsuit) wrote; excerpts of his E-mail follow:

> As a member of the Department subject to this litigation, I would like to express some constitutionally protected viewpoints about this matter, but due to department policy I must request that my name not be attributed to this article because I would probably be subject to disciplinary action.
> 1. It has been my personal experience that each time I was required to work overtime (comp time) it was in response to an order from a supervisor, or it was due to a mandated duty that was required of the Sheriff, and as his deputy, I was obligated by oath to perform.
> ...
> 2. Provisions of the [FLSA] require an employer to pay an employee in cash when a lifetime maximum of 480 hours has been worked. Harris County Commissioner's Court decided by their vote to voluntarily reduce this maximum to 240 hours. This was done for at least two reasons. The first was that the commissioners didn't want Harris County to ever be accused of violating the FLSA on this issue. The second was that they didn't want employees retiring or resigning with a 480 hour "gold parachute" (3 months salary)!
> 4. Occasionally during my career I have had the opportunity to work on the annual budgetary process. Overtime in Harris County government is an "unfunded liability" that each department head is personally responsible for. This means that if an employee exceeds the 240 hour comp time limit (County Policy), then the department head will have that amount debited from their allocated budget. This situation provided sufficient motivation for the department heads to reduce accrued overtime.
> ...
> 7. There is not a department-wide written policy statement that specifies a maximum level of comp time that may be accrued by any employee. In practice though, some bureau commanders have capriciously restricted personnel under their command a maximum comp time bank of 200 hours and others to a maximum of 180. ...[16]

III

Because a public employee undeniably has a property interest in his accrued comp time, he or she cannot be deprived of that property interest without due process of law.[17] Forcing an employee to take his or her comp time when he or she does not want to is depriving that individual of the full use and enjoyment of that property, causing a diminution in the value of the employee's comp time.

The Fifth Circuit's interpretation of the FLSA may well undermine the constitutionality of the Respondents' application of section 207(o) statute on due process grounds. While this issue is not now before the Court, the consequences of affirming the Fifth Circuit's decision and the practice followed in Harris County, Texas, could open the floodgate to public employee challenges, on due process grounds, of actions retroactively limiting the employee's control of comp time usage through employing agency directives ordering its use.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131

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[16]See note 14, concerning this and the other E-mails received.

[17]"The Fifth Amendment to the U.S. Constitution prohibits the federal government from 'taking' private property 'for public use without just compensation.' This limitation on governmental power applies to the state governments through the fourteenth amendment, which prohibits the states from 'depriving' citizens of property 'without due process of law.'" Joseph William Singer, Property Law Rules Policies and Practices, 2nd Ed., 1284 (Aspen Law and Business 1997).

(1998), this Court applied the Due Process and Takings Clauses and held unconstitutional a federal statute that retroactively applied to past activity. In its plurality opinion, the Court concluded that stricter limits on governmental action apply when legislation operates in a retroactive manner and that governmental action is improper and unconstitutional if it places a severe, disproportionate, and extremely retroactive liability on a limited class of parties, under the Takings Clause of the Fifth Amendment.[18] 118 S.Ct. at 2149. As the Court stated:

> Those opinions in *Turner Elkhorn, Connolly, and Concrete Pipe*, make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. And Congress may impose retroactive liability to some degree, particularly where it is "confined to the short and limited periods required by the practicalities of producing national legislation," [Pension Benefit Guaranty Corporation v. R. A.] Gray & Co., 467 U.S., at 731. ... Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and extent of that liability is substantially disproportionate to the parties' experience.

Eastern Enterprises, 118 S.Ct. at 2149. In reaching this result, the Court applied the three factors that traditionally considered in a regulatory takings' analysis: first, the economic impact of the

[18]In *Eastern Enterprise*, Justice Kennedy, joined in the judgment of the Court but dissented from the plurality opinion by Justice O'Connor. He concluded that the statutory provision in the Coal Act must be invalidated, without regard to the Takings Clause of the Fifth Amendment, because the statute violated the proper bounds of settled due process principles. "Accepted principles forbidding retroactive legislation of this type are sufficient to dispose of this case." 118 S.Ct. at 2158 (Kennedy, J., concurring in judgment and dissenting in part).

regulation or action on the claimant; second, the extent to which the action has interfered with the employee's investment-backed expectation--which in this case are the overtime wages; and third, the character of the governmental action. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986).

Clearly, a*micus curiae* NAPO does not contend that the comp time provision of the FLSA give rise to a potential due process or takings violation. To the contrary, we believe that the Congress acted deliberately and rationally in creating this provision. However, we do contend that the Fifth Circuit's interpretation substitutes its own vision and version of what it would like the statute to do--judicial activism not at its best--, and creates serious constitutional concerns. If accepted by this Court, the application of the this interpretation could result in an unconstitutional taking or a violation of substantive due process or both, depending on the circumstances surrounding each employer action.

Affirming the Fifth Circuit's decision would have two consequences. First, it would likely cause severe conflict with the fundamental principles of fairness and justice, which underlie both the Takings Clause, as well as the general Due Process Clause. Second, it would disregard the Congress' efforts to abide by such principles when it enacted this FLSA provision in 1985. Consequently, an acceptance of the Fifth Circuit's interpretation could create a world wherein employers can summarily infringe on employees' property rights and avoid complying with section 207(o) by refusing to pay cash overtime wages.

Consequently, if the Supreme Court adopts the Fifth Circuit's interpretation of § 207(o), it is just a matter of time before many public employers nationwide take control and direct their employees' use of the employee's comp time, potentially placing a severe, disproportionate, and extremely retroactive liability on public safety officers. Employers would be able to retroactively place on those employees who have already earned their wages in the form of comp time, a significant economic burden effecting

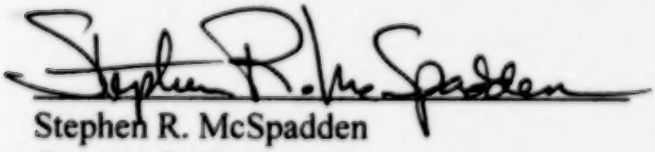
their past and future wages, that would substantially interfere with their "investment-backed expectation".

While *amicus curiae* recognizes that these constitutional issues are not now before this Court, it is only a matter of time before litigation arises on these issues, not only in Texas, but elsewhere in the Country, if this Court affirms the Fifth Circuit's ruling in this case and signals a "green light" to state and local governments to take control over their employees' use of their comp time. We ask the Court to consider these constitutional implications before rendering a decision in this case.

CONCLUSION

For the foregoing reasons, *amicus curiae* NAPO urges this Court to reject the Fifth Circuit's interpretation of §702(o) of the FLSA and either to adopt the only reasonable statutory interpretation of this provision, following the Eight Circuit's decision in *Heaton, supra,* or, alternatively, to accept the Department of Labor's interpretation of the statute, based on a permissible and reasonable statutory construction under *Auer*. Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted this second day of December 1999.



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(20)

DEC 3 1999

No. 98-1167

IN THE
Supreme Court of the United States

EDWARD CHRISTENSEN, *et al.*,
Petitioners,
v.
HARRIS COUNTY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of 68 national and international labor organizations with a total membership of approximately 16 million working men and women. The parties to the case have consented to the filing of this brief as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act requires employers to compensate employees for overtime work—i.e., work in excess of forty hours in a single week—at a rate equal to one and one-half times the employees' regular rate of pay. In general, this requirement is not subject to waiver by agreement. However, the 1985 Amendments to the FLSA create a limited exception allowing public employers to negotiate agreements with their employees substituting compensatory time, earned at a rate of one and one-half hours for each hour of overtime, for overtime pay.

The question presented by this case is whether a public employer who has arranged with its employees to substitute comp time for overtime pay may direct those employees to use their comp time without having reached agreement with the employees in advance that the employer would have this authority. The Department of Labor has consistently taken the position, in interpreting the regulations implementing the FLSA's comp time provisions, that an employer may *not* direct employees to use their comp time in the absence of an agreement giving the employer this authority. The Labor Department's position represents a reasonable interpretation of the statute and the implementing regulations.

In passing the 1985 Amendments to the FLSA, Congress emphatically declared that by permitting the negotiation of comp time agreements it did not intend to diminish in any way the level of compensation required for overtime work. To ensure that comp time agreements provide employees with a level of compensation equivalent to overtime pay, Congress placed several conditions on the substitution of comp time for overtime pay.

Two statutory conditions on comp time are highly relevant to this case. First, comp time can be substituted for overtime pay only if the employer and the employees

knowingly and voluntarily agree to that substitution in advance of the performance of the overtime work. Second, an employee must be allowed to use his or her comp time on request, unless doing so would unduly disrupt the employer's ability to provide services to the public.

The Secretary of Labor's regulations implement the 1985 Amendments in a manner that fulfills the Congressional purpose of allowing public employers and employees a measure of flexibility with respect to overtime compensation, while at the same time ensuring that the value of that compensation to the employees is not materially diminished. In particular, the regulations provide that comp time agreements may contain provisions governing the preservation and use of comp time, but only so long as those provisions comply with the FLSA.

Both the statute and the implementing regulations recognize that the value of comp time as a form of compensation is largely dependent on the employee's right to use that time when it is most beneficial to him or her. Thus, both the statute and the regulations provide express protection of the employee's right to use accrued comp time at his or her request.

Given the statutory scheme and the materiality of the employee's right to control the use of accrued comp time, any provision transferring this control to the employer has to be knowingly and voluntarily agreed to by the employee in advance of performing overtime work. And, that is how the Labor Department interprets the statute and its implementing regulations. The "default rule" fashioned by the court below, allowing the employer to unilaterally assume this authority after the fact, is contrary to both basic principles underlying the FLSA and to the terms and intent of the 1985 Amendments. The Department of Labor's contrary interpretation of the statute is both permissible—and therefore entitled to be sus-

tained on that ground alone—and by far the better reading of the statute.

ARGUMENT

The question presented by this case is whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act, 29 U.S.C. § 207(o), may —absent a preexisting agreement, authorizing the agency to do so—require its employees to use accrued compensatory time at the agency's direction.

Based on its regulations implementing FLSA § 7(o)—the FLSA's comp time provision—the Department of Labor has consistently taken the position "that a public employer may *not* direct its employees to use accrued compensatory time absent an agreement that authorizes it to do so." Brief for the United States as Amicus Curiae 9-10 (emphasis added). *See, e.g.*, Opinion Letter, Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), 1992 WL 845100 ("[I]t is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if the prior agreement specifically provides such a provision, and the employees have knowingly and voluntarily agreed to such provision* freely and without coercion or pressure. See § 553.23(c).") (emphasis added). *See also* 29 C.F.R. § 553.23(a)(2).

As we demonstrate in this brief, "the Secretary [of Labor]'s approach . . . is 'based on a permissible construction of the statute,'" and, therefore, "must [be] sustain[ed]." *Auer v. Robbins*, 519 U.S. 452, 457 (1997), quoting *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

In part A, below, we examine the relevant statutory terms and their legislative history. In part B, we review the relevant regulations implementing those statutory

terms. In part C, we show how the statute and regulations bear upon the question presented in this case. And, in part D, we demonstrate that the answer to this question reached by the court below is incorrect.

A. "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours. . . ." *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728, 739 (1981). Toward this end, "Congress provided in § 6(a) of the Act, 29 U.S.C. § 206(a), that '[e]very employer shall pay to each of his employees . . . wages at the [stated statutory] rates,'" and "in § 7(a)(2) of the Act, 29 U.S.C. § 207(a)(2), that 'no employer shall employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.'" 450 U.S. at 739-740 n. 15.

Given Congress's statutory purpose, "[t]his Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act." *Barrentine*, 450 U.S. at 740. The Court has "held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.*, quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

While this is the basic rule regarding overtime pay, "[i]n 1985, Congress amended the FLSA to provide a limited exception to this rule for state and local governmental agencies." *Moreau v. Klevenhagen*, 508 U.S. 22, 23-24 (1993). Congress was prompted to do so by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), upholding "the

power of Congress to regulate the compensation of state and local employees," and the Department of Labor's announcement "that it would hold public employers to the standards of the Act effective April 15, 1985." *Moreau*, 508 U.S. at 25-26. "In response to the *Garcia* decision and the DOL announcement," Congress enacted "legislation designed to ameliorate the burdens associated with necessary changes in public employment practices." *Id.* at 26.

To the point here, "[u]nder the Fair Labor Standards Amendments of 1985 (1985 Amendments), public employers may compensate employees who work overtime with extra time off instead of overtime pay in certain circumstances." *Moreau*, 508 U.S. at 24. "[T]he new subsection 7(o) . . . allow[s] public employers to compensate for overtime hours with compensatory time off, or 'comp time,' in lieu of overtime pay"—but it does so *only* "so long as certain conditions [a]re met." *Id.* at 26. Careful attention to these conditions is crucial to the "interpretation of the subsection 7(o) exception," given "the well-established rule that 'exemptions from the [FLSA] are to be narrowly construed.'" *Id.* at 33, quoting *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-296 (1959).

Section 7(o) states an authorization permitting public employers to substitute comp time for overtime pay:

> Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by [§ 7(a)(1)]. [29 U.S.C. § 207(o)(1).]

The FLSA comp time provision also states several conditions that a public employer must meet in order to substitute comp time for overtime pay, two of which are directly relevant to the question presented in this case.

The first of these conditions, set forth in § 7(o)(2), is that "[c]omp time must be pursuant to an agreement between the employer and the employee," S. Rep. No. 99-159, 99th Cong., 1st Sess. 4 (1985):

> A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency or representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2).]

The second of these conditions, set forth in § 7(o)(5), is that "[a]n employee may use comp time within a reasonable period of requesting its use, so long as the employer's operation is not unduly disrupted," S. Rep. No. 99-159 at 4:

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time,
>
> shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not

unduly disrupt the operations of the public agency. [29 U.S.C. § 207(o)(5).]

In enacting the 1985 Amendments, Congress emphasized that it was "not retreating" from "[t]he longstanding purposes of the overtime provisions in section 7 [*viz.*,] to fairly and fully compensate employees who must work long hours while encouraging employers to reduce the hours of work and to hire additional persons." H.R. Rep. No. 99-331, 99th Cong., 1st Sess. (1985) 17. *See* S. Rep. No. 99-159 at 7. Accordingly, the sponsors of the 1985 Amendments stated in no uncertain terms that "compensatory time is not envisioned as a means to avoid overtime compensation" but "is merely an alternative method of meeting that obligation." H.R. Rep. No. 99-331 at 23.

The 1985 Amendments authorize comp time agreements not only to "provide flexibility to state and local government employers" but also to provide "an element of choice to their employees regarding compensation for statutory overtime hours." H.R. Rep. 99-331 at 19. Thus, the Senate Report explained the decision to authorize such agreements as follows:

> The Committee . . . is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements. [S. Rep. No. 99-159 at 8.]

The House Report stated the same intent to "offer[] [public] employees and their employers the opportunity to voluntarily agree to the acceptance of compensatory time off at a premium rate in lieu of pay for overtime." H.R. Rep. No. 99-331 at 18. The intent to foster "voluntarily . . . worked out arrangements" that are "mutually satisfactory," S. Rep. No. 99-159 at 8, is reflected in the condition that "[c]omp time must be pursuant to an agreement between the employer and employee," *id.* at 4. *See* H.R. Rep. No. 99-331 at 2. The Amendments' sponsors specified that an "express condition of employment" can qualify as a compensatory time agreement *only*

> so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of th[e] new subsection [7(o)]. [S. Rep. 99-158 at 11. *See* H.R. Rep. No. 99-331 at 20.]

The sponsors of the 1985 Amendments understood that the value to the employee of accrued compensatory time resides "in being able to make *beneficial use* of the accumulated . . . time." H.R. Rep. No. 99-331 at 23 (emphasis added). Thus, the Amendments "sought to balance the employee's *right to make use of compensatory time* that has been earned and the employer's interests in avoiding a disruption in operations." *Id.* at 21 (emphasis added). *See* S. Rep. No. 99-159 at 11 ("balance the employee's *right to make use* of comp time that has been earned and the employer's need for flexibility in operations") (emphasis added).

Congress sought to protect "the employee's right to make use of compensatory time" in two related ways. First, in order to avoid the accumulation of more compensatory time than employers could realistically be expected to let their employees use, § 7(o)(3)(A) places maximum limits on the number of hours of compensatory time

that employees can accrue. Second, Congress provided that an employee who makes a request to use compensatory time "shall be permitted by the . . . employer to use such time within a reasonable period after making the request if [it] . . . does not unduly disrupt the [employer's] operations." 29 U.S.C. § 207(o)(5)[2]. Consistent with these limitations, the sponsors of the 1985 Amendments stated that while a comp time agreement "may include other provisions governing the preservation, use or cashing out of comp time," the agreement may do so only "so long as those provisions do not conflict with this subsection or the remainder of the Act." S. Rep. No. 99-159 at 11. *See* H.R. Rep. No. 99-331 at 2.

The statutory conditions imposed on the substitution of comp time for overtime pay—that the substitution occur pursuant to "an agreement or understanding arrived at between the employer and employee before the performance of the work," 29 U.S.C. § 207(o)(2)(A), and that the affected employees "be permitted . . . to use [accrued comp] time within a reasonable period after making [a] request," 29 U.S.C. § 207(o)(5)—reflect the essential nature of comp time as a form of earned "overtime compensation." H.R. Rep. No. 99-331 at 23. It is precisely because comp time represents accrued earnings that Congress took pains to safeguard "the employee's right to make use of comp time." S. Rep. No. 99-159 at 11. *See* H.R. Rep. No. 99-331 at 23.

B. The Secretary of Labor has authority to "promulgate such regulations as may be required to implement [§ 7(o)]." 29 U.S.C. § 203 note. The regulations promulgated by the Secretary pursuant to this express authority are faithful to both the text of the 1985 Amendments and to the declared purpose of Congress. *See* 29 C.F.R. Part 553, Subpart A.

[2] Moreover, employers retain the option of paying employees for their compensatory time at the employees' regular rate of pay, 29 U.S.C. § 207(o)(3)(b), thereby preventing an accumulation of more compensatory time than they can grant in the form of leave.

The Secretary's comp time regulations effectuate the Congressional admonition that "[c]ompensatory time cannot be used as a means to avoid statutory overtime compensation." 29 C.F.R. § 553.25(b). *See* H.R. Rep. No. 99-331 at 23. In so doing, the regulations give substance to the basic proposition that "compensatory time off . . . is an alternative form for paying public employees . . . for overtime hours worked," and to the corollary that "[t]he public employee's 'comp time bank' is not the property of the employer to control, but rather belongs to the employee." 60 Fed. Reg. 2206-07 (Jan. 6, 1995).

To begin with, the regulations satisfy the condition—specified in § 7(o)(2)—that comp time agreements are "voluntarily . . . worked out arrangements" that are "mutually satisfactory" to both the employees and the employer. S. Rep. No. 99-159 at 8.

Thus, where employees have a collective bargaining representative, the regulations require that the comp time agreement "must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement." 29 C.F.R. § 553.23(b).

"Where employees of a public agency do *not* have a recognized or otherwise designated representative," the regulations specify conditions on any "[a]greement or understanding between the public agency and individual employees," which ensure that employees freely and voluntarily enter into such agreements. 29 C.F.R. § 553.23(c) (emphasis added). In the first place, any such individual

agreement "must be reached prior to the performance of work." *Id.* Secondly, if the individual agreement "take[s] the form of an express condition of employment," the following requirements must be met:

> (i) the employee [must] knowingly and voluntarily agree[] to [comp time] as a condition of employment and (ii) the employee [must be] informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. [*Id.*]

Finally, while "[a]n agreement or understanding may be evidenced by a notice to [an] employee that compensatory time off will be given in lieu of overtime pay . . . with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay . . . , the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure." *Id.*[3]

The regulations contemplate that comp time agreements may go beyond providing that form of overtime compensation as a substitute for the overtime pay otherwise required by the statute to spell out some or all of the terms and conditions that govern the workings of a compensatory time system in a given workplace. For example, the regulations state that the parties may agree to restrict the provision of compensatory time to certain hours of work. 29 C.F.R. § 553.23(a)(2). The regulations specify, as well, that the parties may agree that the employer will offer a combination of compensatory time and overtime pay "so long as the [FLSA] premium pay principle of at least 'time and one-half' is maintained." *Id.* § 553.23(a)(2); *see id.* at § 553.22(b). The regulations also provide that the agreement may "govern the meaning of 'reasonable period' " within which an employer must, absent undue disruption, grant a request to use comp time. *Id.* at § 553.25(c)(2). And, more generally, the regulations provide that "the agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time *so long as these provisions are consistent with section 7(o) of the Act.*" *Id.* at § 553.23(a)(2) (emphasis added).

Very much to the point here, the regulations effectuate Congress's intent to protect "the employee's *right to make use* of comp time that has been earned." S. Rep. No. 99-159 at 11 (emphasis added). *See* H.R. Rep. No. 99-331 at 21. Thus, the regulations prohibit an employer from "coerc[ing]" an employee who has entered into a comp time agreement to "accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time." 29 C.F.R. § 553.25(b).[4] And, the regulations implement the statu-

[3] The initial text of the regulation provided that in the case of notice by the employer, a comp time agreement would be presumed to exist as to any employee who expressed no unwillingness to accept compensatory time, *and* "who accepts compensatory time in lieu of overtime pay after being so notified." 51 Fed. Reg. 13402, 13407 (Apr. 18, 1986). The Secretary deleted the aceptance-after-notification requirement in the final regulation after the National League of Cities protested that "employers should not have to wait for employees to work overtime in order to be certain that the 'agreement' requirement has been met," 52 Fed. Reg. 2012, 2015 (Jan. 16, 1987), and substituted the requirement for free, uncoerced and unpressured consent that appears in the final rule. *Id.* at 2035. The text of the final regulation makes clear, therefore, that the omission of this language was not intended to diminish in any way the role of free employee consent in the provision of compensatory time.

[4] This requirement of prompt "payment" parallels the Secretary's requirements regarding prompt payment of cash overtime. *See* 29 C.F.R. § 778.106 (payment must ordinarily occur on the payday for the period in which overtime was worked; if problems arise as

tory condition that an employer may not deny a request to use comp time unless granting the request would "unduly disrupt the operations of the public agency," 29 U.S.C. § 207(o)(5), by specifying:

> For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. [29 C.F.R. § 553.25(d).]

C. As noted at the outset, it is the Labor Department's "position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed if the prior agreement specifically provides such a provision, and the employees have knowingly and voluntarily agreed to such provision," Opinion Letter, Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), 1992 WL 845100, and "that a public employer may not direct its employees to use accrued compensatory time absent an agreement that authorizes it to do so," Brief for the United States as Amicus Curiae 9-10. The Department's position follows ineluctibly from FLSA § 7(o) and the Secretary's regulations implementing §7(o).

The statute and the regulations allow the employer to negotiate a comp time agreement with its employees that includes "provisions governing the preservation, use, or cashing out of compensatory time," subject to the limitation that the "provisions are consistent with section 7(o) of the Act." 29 C.F.R. § 553.23(a)(2). *See* Brief

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to computation, then "[p]ayment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due," but in no event "later than the next payday after such computation is made").

for the United States as Amicus Curiae at 10 n.6. *See also Heaton v. Moore*, 43 F.3d 1176, 1180 & n.4 (8th Cir. 1994), *cert. denied sub nom. Schiro v. Heaton*, 515 U.S. 1104 (1995) (reserving question as to the consistency of "additional agreements between the employer and the employees which may limit the time and manner of the employees' use of compensatory time" with FLSA § 7(o)).

At the same time—and this is of the essence here—provisions governing the preservation or use of comp time —such as a provision that the employer can direct the employee's use of her comp time—must be part of the "voluntarily . . . worked out arrangements" that are "mutually satisfactory" to both the employees and the employer, S. Rep. No. 99-159 at 8, and that are embodied in "an agreement or understanding arrived at between the employer and employee before the performance of the work," 29 U.S.C. § 207(o)(2)(A).

FLSA-sanctioned comp time in its basic form is comp time the employee has a right to take when it is most useful to the employee, so long as that is not "unduly disrupt[ive]" to the employer's operations. Precisely because this is so, § 7(o)(5) provides statutory protection for this employee right by stating that an employee who has requested the use of comp time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request." 29 U.S.C. § 207(o)(5).

The statutory scheme, in other words, recognizes that the employee's right to take accrued comp time when it is most useful to the employee is a crucial determinant of the true value of this form of overtime compensation to the employee. The other side of the coin is that employer authority to direct an employee to use his or her accrued comp time when it is most useful to the employer, rather than when it is most useful to the employee, works

a substantial diminution in the value of comp time to the employee.

To put this in concrete terms, being compensated for overtime work with comp time that the employee can use as he or she sees fit closely resembles being compensated with cash that the employee can freely spend. By contrast, being compensated for overtime work with comp time that is under the employer's control closely resembles payment in script that the employee can use only at the company store.

It is to the point in this regard that with respect to union-represented employees, § 7(o)(2)(A)(i) provides that "[a] public agency may provide compensatory time . . . only pursuant to . . . applicable provisions of a collective-bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees." 29 U.S.C. § 207(o)(2)(A)(i).[5] In the collective bargaining setting, it goes without saying that an employer could not lawfully change the settled comp time arrangements by unilaterally assuming an authority to direct employees when to take their accrued leave not stated in the agreement. Nothing in the statute suggests that an employer has any greater freedom unilaterally to alter the terms of individual comp time agreements with unrepresented employees. To the contrary, the Department of Labor regulations contain special protections applicable to individual comp time agreements precisely to ensure that employees who lack the protection of union representation are not "co-

[5] In the collective bargaining setting, comp time provisions are, thus, by virtue of FLSA § 7(o)(2)(A)(i), "terms and conditions of employment" that must be "specified by the express terms of a collective-bargaining agreement" and cannot be unilaterally imposed by either party. *See Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

erc[ed or] pressure[d]" by their employers into agreements whose terms render comp time an inferior substitute for overtime pay. 29 C.F.R. § 553.23(c). *See* Pet. App. 22a.[6]

[6] This case does not require the Court to determine the extent to which a comp time agreement may provide for employer of control employee use of comp time. Nevertheless, for sake of completeness, we outline here several considerations that we believe would guide such an inquiry.

First, an agreement giving the employer a measure of control over the use of compensatory time could not waive or abridge any of the employee's FLSA rights. *Barrentine*, 450 U.S. at 740. Thus, in order to preserve the nature of compensatory time as a substitute for overtime such an agreement would need to preserve the employee's "ab[ility] to make beneficial use of the accumulated compensatory time." H.R. Rep. No. 99-331 at 23. Before requiring an employee to use an amount of accrued compensatory time on a date or dates chosen by the employer, the agreement would first need to provide the employee with a genuine option of using that leave according to his or her own desires, subject only to the statutory and regulatory provisions governing employee requests. 29 U.S.C. § 207(o)(5); 29 C.F.R. 553.25. *See* Brief for the United States as Amicus Curiae at 10 n.6. The dissent in this case suggests that further criteria "for evalutaing the reasonableness and legality of any consensual limitations upon the employee's right to use and preserve compensatory time earned" should resemble the considerations set out in the Secretary's regulations for determining the "reasonable period" during which the employer must grant a request to use compensatory time and for determining whether granting such a request would unduly disrupt the employer's operations. Pet. App. 19a. *See* 29 C.F.R. § 553.25(c). These considerations advance the statute's goal of preserving the employee's beneficial use of compensatory time without jettisoning the employer's ability to staff its operations adequately. *See* 29 C.F.R. § 553.25(d).

Second, as to the form of permissible agreement, the Secretary has taken the position that any terms governing the use of compensatory time must appear in a "specific[] . . . provision" of the compensatory time agreement. Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100. In the event that the employer and employee have an agreement that is not in writing, the regulations make it clear that the employer must nonetheless keep a record of any consensual limits on

In sum, given the centrality of employee control over comp time use and the difference in value between employe-controlled comp time and employer-controlled comp time, an employee cannot be deemed to "knowingly and voluntarily agree" to an arrangement providing for employer-controlled comp time in lieu of overtime pay, 29 C.F.R. § 553.23(c), if the substitution of employer control for employee control is not explicitly stated in the agreement before the overtime work is performed. And, that is precisely how the Labor Department's interprets the statute and its regulations.

D. The court of appeals proceeded in total disregard of the overall FLSA statutory scheme, the core FLSA concept of comp time as a form of compensation that includes an employee right to control the use of accrued leave, and the statutory requirement that comp time agreements be "voluntarily . . . worked out arrangements" that are "mutually satisfactory" to the parties, S. Rep. No. 99-159 at 8. The court below did so by ruling that, because "the parties have not identified any controlling provisions" in their agreement expressly addresing the employer's authority to direct the use of accrued comp time, it was the court's "obligation . . . to fashion a background rule, which the parties remain free to displace in future negotiations," and by deriving its "default rule" implying into comp time agreements a provision "allowing an employer to establish uniform employment policies with respect to questions not previously negotiated" from "the general principle that the employer can set workplace

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an employee's ability to use accrued compensatory time. 29 C.F.R. §§ 553.23(c)(1), 553.50(d).

Finally, and as discussed in text, the legitimacy of any provision in a compensatory time agreement ceding control to the employer over the use of such time, regardless of the form it takes, also hinges on the employee's free, uncoerced, and unpressured consent to such conditions prior to the performance of the work. 29 C.F.R. § 553.23(c)(1).

rules in the absence of a negotiated agreement to the contrary." Pet. App. 12a-13a citing Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989) (discussing "the legal rules of contracts and corporations").

To begin with the most elementary flaw, the FLSA "was *not* designed to codify or perpetuate [industry] customs . . ." *Barrentine*, 450 U.S. at 741, quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944) (emphasis added). Whatever "the general [employer prerogative] principle" may be, the law established by FLSA § 7(o) is that 'in the absence of a negotiated agreement," Pet. App. 12a, there will be no substitution of comp time for overtime pay at all. 29 U.S.C. § 207(o)(2)(A). That being so, it was entirely improper for the court below to import into the FLSA an employer prerogative rule that would imply into comp time agreements a provision that materially interferes with the employee's "ab[ility] to make beneficial use of the [employee's] accumulated compensatory time." H.R. Rep. No. 99-331 at 23.

Equally to the point, the court below erred in proceeding as if it were free to "impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843; *Auer*, 519 U.S. at 462.[7] Here there is "an administrative

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[7] The reliance of the court below on § 7(o)(3)(B) was completely misplaced. Pet. App. 9a. That provision allows an employer to pay "an employee for accrued time off . . . at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. 207(o)(3)(B). As the dissent recognized, this section simply permits employers to reduce the amount of compensatory time in each employee's bank "by paying cash—the usual and superior form of overtime compensation." Pet. App. 22a. *See* 29 C.F.R. § 553.27(a) (this provision allows employers "at any time" to make payments at the regular rate for accrued compensatory time.

interpretation," and the court was required to determine whether the Labor Department's answer to the question presented here, that is embodied in that administrative interpretation, was "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Had it done so, as we have shown, the court below could only have concluded that the Department's position that an employer is prohibited from unilaterally requiring employees to use their compensatory time is "based on a permissible construction of the statute."

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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(8)

No. 98-1167

IN THE

Supreme Court of the United States

EDWARD CHRISTENSEN, *et al.*,
Petitioners,

v.

HARRIS COUNTY, TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

This brief *amicus curiae* is filed by the International Association of Fire Fighters, AFL-CIO, C.L.C. ("IAFF"), an unincorporated association comprised of municipal, state, federal and private sector fire fighters and emergency

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

medical services employees located throughout the United States and Canada, in support of the petitioners, Edward Christensen, *et al.* The parties to this case have consented to the filing of this brief *amicus curiae,* as provided for in the Rules of this Court. The parties' signed consent forms have been filed with the Clerk of this Court in accordance with these Rules.

The IAFF has over 225,000 state and municipal members. The IAFF's mission includes protecting the safety and improving the working conditions for fire fighters and emergency medical services personnel, as well as advancing the general health and welfare of those employees through collective bargaining, court action, grass roots lobbying and other appropriate means.

As public sector employees, many IAFF members are subject to comp time arrangements in their workplaces. Indeed, IAFF members who have earned time off by working long overtime hours have found that, with careful planning, comp time can be a useful benefit. For instance, IAFF members have used comp time to spend additional time with their families on planned family vacations, or to tend to the medical or child care needs of their families. This benefit is severely undermined, if not eliminated, by a policy which would allow their employers to force them to use their hard-earned comp time at their employer's convenience. Moreover, IAFF members who are covered by comp time policies believe that it is only fair that they be allowed control over the use of their comp time in the same manner that IAFF members not subject to such policies are allowed to spend their cash overtime on whatever they wish.

The IAFF has worked hard to ensure that the comp time arrangements covering its members are implemented

and administered fairly and in a manner consistent with the law. Nevertheless, the employers of some IAFF members have attempted to subject IAFF members to forced usage policies. While the IAFF has successfully defeated such attempts, *see, e.g., Rogers v. City of Virginia Beach,* No. 98-2253, 1999 WL 498707 (4th Cir. July 15, 1999), its ability to continue to protect its members' rights in this respect is obviously dependent upon the outcome in this case. Accordingly, the IAFF and its members have a direct and substantial interest in the case before this Court.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act (FLSA) requires all employers to whom it applies to compensate employees for all overtime hours worked, at a rate not less than one and one-half times their regular rate. Congress imposed this requirement upon employers to protect workers from substandard wages and oppressive working conditions, and to spread employment by placing financial pressure on the employer who would otherwise schedule massive overtime hours.

In 1985, Congress provided a narrow exception from the Act's overtime requirement that allows employees of a public agency to receive compensatory time in lieu of cash overtime compensation, subject to the conditions set forth in 29 U.S.C. § 207(o). Because § 207(o) is a limited exception to the requirement that employees must be paid cash overtime, it must be narrowly construed against the employer who seeks to take advantage of this exception. An employer whose comp time policy does not fit within this narrow exception must provide cash overtime to its employees.

In § 207(o)(3), Congress allows employees to create comp time banks, but limits the amount of comp time

that may be accrued in these banks. Any overtime worked by an employee who has accrued the maximum amount of comp time hours allowed by this statutory cap must be paid in cash for additional overtime hours. The FLSA provides only three mechanisms by which an employer may reduce the accrued comp time balance of an employee: by paying the employee cash for these hours; by cashing out the comp time upon the employee's termination; or by granting an employee's request to use comp time. The FLSA does not allow an employer to reduce an employee's comp time balance by forcing the employee to take time off from work.

The Fifth Circuit Court of Appeals erred by concluding that Harris County could unilaterally force its employees to use their comp time simply because the FLSA does not specifically prohibit this practice. Under similar circumstances, this Court has held that Congress' failure to specifically prohibit an employer practice under the FLSA does not preclude it from invalidating that practice, where the legislative policy of the FLSA would be thwarted by allowing the practice. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 713 (1945). The forced usage policy unilaterally imposed by Harris County is inconsistent with § 207(o) not only because it is not one of the three mechanisms by which Congress specifically allows employers to reduce the accrued comp time of their employees, but also because it allows an employer to evade, both intentionally and indefinitely, the requirement that it pay cash overtime to employees who have accrued more than the statutory cap set forth in § 207(o)(3). Moreover, Harris County's policy thwarts the FLSA's purpose by allowing employers to restrict the ability of employees to request use of their comp time, as provided in § 207(o)(5), and by allowing employers to control the way in which its employees spend their comp time. The

exercise of such control over an employee's cash overtime is comparable to, and as impermissible as, the use of company scrip in the early Industrial Age.

Because forced usage policies are inconsistent with § 207(o), an employer should not be able to implement such policies pursuant to an "agreement" with its employees purporting to allow forced usage. An employee's right to cash overtime is mandatory under the FLSA, and is therefore generally not subject to agreements to waive this right. Where the FLSA provides for agreements between employers and employees, these provisions must be narrowly construed. While § 207(o)(2) requires employers to obtain agreements with their employees as a condition of instituting a comp time policy, nothing in this subsection contemplates an "agreement" by which an employer could force its employees to use their accrued comp time. Moreover, allowing for "agreements" to permit forced usage would thwart the legislative purposes of the FLSA by allowing employers to use their superior bargaining power to avoid having to compensate their employees in cash overtime. The considerable deference shown by the courts to employers in finding the existence of agreements in other contexts under the FLSA, such as under the sleep time exclusion, amply illustrates that an "agreement" requirement would be inadequate to protect public employees against their employers' superior bargaining power in this context.

ARGUMENT

I. THE CIRCUIT COURT'S DECISION MUST BE REVERSED BECAUSE IT IS INCONSISTENT WITH THE LANGUAGE AND LEGISLATIVE PURPOSE OF THE FAIR LABOR STANDARDS ACT.

The Fifth Circuit Court of Appeals concluded that, in the absence of an agreement prohibiting forced usage,

public employers enjoy absolute freedom to force their employees to use their accrued hours, simply because the Fair Labor Standards Act (FLSA) contains no provision specifically prohibiting such a practice. In reaching this conclusion, the Court applied a "default" rule that "the employer can set workplace rules in the absence of a negotiated agreement to the contrary." *Moreau v. Harris County*, 158 F.3d 241, 247 (5th Cir. 1998). The Circuit Court's interpretation of the FLSA, as well as its rationale in reaching its decision, are seriously flawed and must be reversed.

Permitting employers to dictate to employees the circumstances under which they may use their hard-earned overtime compensation violates certain well-established core principles under the FLSA. The FLSA is a remedial statute that requires all employers to whom it applies to compensate employees for all overtime hours worked "at a rate not less than one and one-half times the regular rate" at which they are employed. 29 U.S.C. § 207(a)(1); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 39 (1944). Congress imposed this requirement upon employers to protect workers from substandard wages and oppressive working hours, and to spread employment by placing financial pressure on the employer who would otherwise schedule massive overtime hours. *Walling*, 323 U.S. at 40; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945). As shall be demonstrated, *infra*, employer devices and schemes designed to avoid these requirements have been consistently struck down by the courts.

Congress applied the overtime requirements of the FLSA to public employers in 1974. 29 U.S.C. § 203(d) and (x). Following this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which confirmed that the FLSA is properly

applied to public employers, Congress enacted a narrow exception from the FLSA's overtime requirement that allows employees of a public agency to receive compensatory time in lieu of cash overtime compensation. 29 U.S.C. § 207(o). This Court has specifically held, however, that § 207(o), as a limited exception to the requirement that employees must be paid cash overtime, must be " 'narrowly construed' " against the employer who seeks to take advantage of this exception. *Moreau v. Klevenhagen*, 508 U.S. 22, 33-34 & n.16 (1993) (quoting *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-96 (1959)); *see also Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Accordingly, public employers may "take advantage of the benefits [the comp time exception] offers only pursuant to certain conditions set forth by Congress." *Moreau*, 508 U.S. at 34 n.16. An employer who fails to satisfy these narrow conditions "remains in precisely the same position as any other employer subject to the overtime pay provisions of the FLSA." *Moreau*, 508 U.S. at 34 n.16.

The foregoing principles reflect the FLSA's presumption in favor of cash overtime for public employees. A public employer wishing to substitute comp time for cash overtime must overcome this presumption by demonstrating that its comp time policy fits within the narrow exception created by Section 207(o). Employers unable to meet this burden are required to reimburse their employees in cash overtime in an amount equivalent to their accrued comp time. *See, e.g., Nevada Employees Ass'n v. Bryan*, 916 F.2d 1384 (9th Cir. 1990).

The plain language of § 207(o) sets forth clear limits upon the manner in which employers may take advantage of the benefits of the comp time exception. As recognized by this Court in *Moreau*, § 207(o)(2) prohibits public

employers from instituting a comp time policy unless, and until, they obtain an agreement with their employees to provide comp time *prior* to the performance of overtime work. 29 U.S.C. § 207(o)(2)(A) and (B). The comp time amendments specifically allow employers and employees to create banks in which to store an employee's accrued comp time, but they limit the amount of comp time that may be accrued by a public safety employee to 480 hours. 29 U.S.C. § 207(o)(3)(A). Employers are required to pay cash, and only cash, for any overtime hours worked by employees who have accrued the maximum amount of comp time hours allowed by this statutory cap. 29 U.S.C. § 207(o)(3)(A).

It is particularly significant to the instant case that § 207(o) contains only *three* mechanisms by which an employer may reduce the accrued comp time balance of an employee. First, the statute requires that an employer wishing to reduce an employee's comp time balance "shall" do so by paying off the accrued balance in cash, "at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. § 207(o)(3)(B). Second, an employee is entitled to receive the cash value of any accrued comp time upon termination of employment. 29 U.S.C. § 207(o)(4). Third, an employer must allow an employee to use accrued comp time within a reasonable period after the employee's request, so long as use of the time does not unduly disrupt the operations of the public agency. 29 U.S.C. § 207(o)(5).

Significantly, the FLSA does *not* contain any *additional* mechanism to allow an employer to reduce its employees' accrued comp time balance by forcing its employees to take time off from work. The Circuit Court erroneously concluded that the statute's failure to *prohibit* such a policy compels the conclusion that Congress intended

that employers be free to impose such a condition. Indeed, the Circuit Court went so far as to apply a "default" rule by which the employer can set any workplace rules regarding overtime in the absence of a negotiated agreement to the contrary. 158 F.3d at 247. The Circuit Court's conclusion is fundamentally unsound for the simple reason that it ignores the principle, as clearly set forth by this Court in *Moreau*, that comp time is an exception to the FLSA's cash overtime requirements, and that Congress has specifically identified the only circumstances in which comp time may be used. As correctly recognized by the Eighth Circuit,

> An employee has the right to use the accrued time as the employee sees fit subject only to the employer's limited right to deny an employee's request if it would unduly disrupt the employer's operations. Congress has not provided the employer with any further right to unilaterally control or to force the employee's use of compensatory time.

Heaton v. Moore, 43 F.3d 1176, 1180 (8th Cir. 1994), *cert. denied*, 515 U.S. 1104 (1995). *See also Hellmers v. Town of Vestal*, 969 F. Supp. 837 (N.D.N.Y. 1997) (refusing to allow employer to force comp time usage on grounds that the court will not "expand an employer's power to condition use of comp time beyond that which Congress has provided").

The Circuit Court's ruling would produce a result that is inconsistent with the three mechanisms explicitly provided by Congress for the reduction of accrued comp time. Permitting employers to dictate when an employee will use his or her accrued comp time eviscerates the requirement under § 207(o)(5) that employee requests to use comp time be granted so long as the request does not unduly disrupt the operations of the agency. If the em-

ployer can tell the employee when to use accrued comp time, the employee's desire as to when to use this comp time is obviously compromised, if not eliminated.[2] Further, as illustrated by the facts of the instant case, the Circuit Court's interpretation will allow employers to evade, both intentionally and indefinitely, the statutory cap which Congress placed on the accrual of comp time—as well as the employers' obligation to compensate employees in cash for overtime hours worked in excess of this cap—by simply requiring employees to use their accrued comp time whenever their comp time balance approaches the statutory limit.

These consequences could not possibly have been intended by Congress when it enacted § 207(o). Indeed, as demonstrated by the foregoing, the Circuit Court's construction of § 207(o) effectively nullifies operation of the specific protections afforded to employees by Congress in §§ 207(o)(3)(A), (3)(B) and (5). It is, of course, a " 'cardinal principle of statutory construction' " to " 'give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, ——, 137 L.Ed.2d 281, 302 (1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538 (1955)). The Circuit Court's interpretation of § 207(o) violates this cardinal rule of construction in two important respects: first, it allows employers to intentionally evade the statutory cap placed on accrued comp time by § 207(o)(3); and, second, it allows employers to

[2] It is easy to illustrate how forced usage would nullify public employees' rights under § 207(o)(5). It is axiomatic that once an employer has forced an employee to use comp time, this time is no longer available to be used pursuant to an employee's request. For example, an employee who is hoping to use accrued comp time for a family vacation will no longer have the time available for this use if the employer dictates that the employee's comp time be used at an earlier date for the employer's convenience.

disregard employees' interests as to when to use accrued comp time in favor of the employer's interests, which contradicts the intent of § 207(o)(5). Permitting forced use of comp time effectively nullifies these statutory protections that are specifically afforded to employees under the FLSA.

The Circuit Court concluded that Harris County's forced usage policy is consistent with the FLSA, even if implemented for the specific purpose of evading the statutory cap set forth in § 207(o)(3), because Congress did not specifically prohibit this particular policy in the text of the statute. This approach is wrong because it broadly, rather than narrowly, construes the comp time exception for employers. Moreover, the Circuit Court's approach demands of Congress a clairvoyance that it simply cannot possess by requiring Congress to anticipate, and specifically prohibit, any policy by which employers might attempt to evade the conditions placed upon their use of comp time in § 207(o).

Indeed, this Court, under similar circumstances, has explicitly held that Congress' failure to specifically prohibit an employer practice under the FLSA does not preclude it from invalidating the practice, where the legislative policy of the FLSA would be thwarted by allowing the practice. In *Brooklyn Savings Bank*, 324 U.S. at 713, the employer, like Harris County in the instant case, argued that this Court could not prohibit employers from obtaining employee waivers of FLSA rights because the FLSA did not contain a provision which specifically prohibited this practice. While acknowledging that "[t]here is no indication why Congress did not embody [such a] provision" in the FLSA, this Court concluded that the "[a]bsence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative pol-

icy would be thwarted by permitting such contracts." 324 U.S. at 713.

The instant case demands the identical approach. Only by interpreting the FLSA to prohibit forced usage policies can the FLSA's presumption in favor of cash overtime be preserved. Absent such a ruling, employers such as Harris County will be able to avoid ever having to pay cash overtime to their employees by simply requiring these employees to take time off whenever their accrued comp time balances approach the statutory limit. Further, employers such as Harris County will be able to force employees to use accrued comp time in circumstances that are most favorable to the employer with complete disregard to the interests of the employee, who, after all, actually earned the comp time through his or her labor.

In many respects, the Circuit Court's decision allows for a compensation system that is no better than the now-illegal "company scrip" compensation systems of the early Industrial Age. While employees were paid for every hour they worked under the company scrip system, this compensation method was deemed illegal because it allowed the employer to control how its employees spent their hard-earned compensation. The forced usage policy approved by the Circuit Court leads to the same result, allowing the employer to dictate how its employees' compensation shall be used.

An equally detrimental, if not as obvious, outcome of allowing employers to force employees to use their accrued comp time would be to allow employers such as Harris County to accomplish through judicial construction of the FLSA what cannot be accomplished pursuant to the plain language of the statute. This is no better illustrated than by the Eighth Circuit's decision in *Heaton v. Moore*, *supra*. In *Heaton*, the employer, like Harris

County in the instant case, unilaterally imposed a policy that forced its employees to use their accrued comp time before reaching the statutory cap. Significantly, the employer argued that its forced usage policy was necessary to avoid the "unduly disruptive" effect of having to pay cash overtime to employees who had accrued more than 480 hours of comp time in their accounts. The Eighth Circuit rejected this argument, correctly concluding that the eventual payment of cash overtime can *never* be held to be "unduly disruptive" within the meaning of § 207(o)(5) for the simple, and obvious, reason that employers are *explicitly required* to pay cash overtime to employees whose accrued comp time exceeds the statutory cap. As succinctly stated by the Eighth Circuit, if public employers want to control their employees' accrual of comp time, they can simply do what other employers are required to do under the FLSA: "schedule less overtime and/or hire more [employees] to reduce the need for compensatory time." *Heaton*, 43 F.3d at 1181. This outcome, and only this outcome, accomplishes the fundamental objectives of the overtime requirements of the FLSA.

Simply put, had Congress intended to provide employers with the "open-ended" authority to force employees to use their accrued comp time as a means of avoiding cash overtime payments, "it surely would have said so more simply" in the text of Section 207(o). *Moreau*, 508 U.S. at 33. Further, if Congress had wanted employers' interests to be equal to employees' interests in deciding when to use accrued comp time, Congress would surely have indicated this intention in § 207(o)(5).

II. BECAUSE FORCED COMP TIME USAGE IS INCONSISTENT WITH § 207(o), AN EMPLOYER MAY NEVER FORCE AN EMPLOYEE TO USE ACCRUED COMP TIME, WHETHER PURSUANT TO AN "AGREEMENT" WITH ITS EMPLOYEES PURPORTING TO ALLOW SUCH A CONDITION OR OTHERWISE.

The question on *certiorari* that was presented by petitioners asks whether a public employer may compel employees to utilize their accrued compensatory time involuntarily, "absent an agreement with the employer permitting such compulsion." *Amicus* respectfully submits that, under the FLSA, a public employer may *never* force its employees to utilize their accrued comp time, pursuant to an agreement purporting to allow such forced usage or otherwise.

The majority opinion below did not reach the particular question of whether employees can agree to let their employers dictate when their comp time will be used, nor did the Eighth Circuit in *Heaton*, 43 F.3d at 1180 n.4 (specifically refraining from deciding this question). Should this Court, however, decide to reach this question, *amicus* respectfully submits that any agreement which purports to allow a public employer to force its employees to use their accrued comp time violates the FLSA, and is therefore unenforceable as a matter of law.

Analysis of this question properly begins with the recognition that an individual employee's rights under the FLSA are mandatory, and are generally not subject to negotiation or bargaining between employers and employees. *Brooklyn Savings Bank*, 324 U.S. at 707-08; *Gaby v. Omaha Home for Boys*, 140 F.3d 1184, 1186 (8th Cir. 1998) (" 'employers and employees may not, in general, make agreements to pay and receive less pay than the statute provides' ") (quoting *Rudolph v. Metro-*

politan Airports Comm'n, 103 F.3d 677, 680 (8th Cir. 1996)). Indeed, this principle is so important that courts have barred agreements that are inconsistent with the FLSA even where employees have demonstrated "enthusiastic assent" to such agreements. *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993).

The reason for this principle is simple—in enacting the FLSA, Congress recognized that "there are often great inequalities in bargaining power between employers and employees." *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982). *See also Braddock v. Madison County, Ind.*, 34 F. Supp. 2d 1098, 1106 (S.D.Ind. 1998) (noting Congress' recognition in enacting the FLSA that employers "often have much greater bargaining power than employees"). Accordingly, this Court has held that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.' " *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 740 (1981) (quoting *Brooklyn Savings Bank*, 324 U.S. at 707).

As *amicus* demonstrated earlier, a forced usage policy does not fit within the narrow comp time exception from the FLSA's overtime requirements that was crafted by Congress in 29 U.S.C. § 207(o). It necessarily follows that any agreement purporting to allow an employer to force its employees to use accrued comp time would be invalid and unenforceable as a matter of law. *Brooklyn Savings Bank*, 324 U.S. at 713.

This conclusion is unaffected by 29 U.S.C. § 207(o)(2), which requires public employers to obtain agreements with their employees as a condition precedent to the implementation of a comp time policy. As exemplified by § 207(o)(2), the FLSA contains a limited number of

provisions that explicitly allow employers and employees to reach agreements with respect to certain compensation issues. For instance, the FLSA specifically allows employers engaged in the operation of a hospital to agree to a work period of fourteen consecutive days for purposes of determining entitlement to overtime compensation. 29 U.S.C. § 207(j). The Act also allows employees, under certain conditions, to agree to accept a payment of unpaid wages in settlement of an action brought to enforce the FLSA. 29 U.S.C. § 216(c).[3] Because these provisions represent exceptions to the rule that FLSA rights are not subject to waiver, each of these provisions must be narrowly construed, and strictly applied according to their literal terms, so as to prevent agreements that are the product of uneven bargaining power from usurping the statutory guarantees of the FLSA. *Brooklyn Savings Bank*, 324 U.S. at 705; *Lynn's Food Stores, Inc.*, 679 F.2d at 1354 (holding that approval of

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[3] Other provisions in the FLSA which allow for deference to agreements between employers and employees include § 207(b) (allowing the parties to define hours of employment through collective bargaining agreements); § 207(e)(7) (allowing the parties to exclude from an employee's regular rate premium-rate compensation paid pursuant to an employment agreement); § 207(f) (allowing agreements to establish, under certain conditions, workweeks of irregular hours); § 207(g) (allowing agreements on piece-rate work); and § 207(n) (allowing agreements to exclude certain hours worked by electric railway, trolley or motor carrier operators). The Department of Labor has promulgated several regulations which also allow for modification of FLSA rights through agreements. For instance, 29 C.F.R. § 553.222(c) allows for the exclusion of sleep time from a fire fighter's compensable hours if there exists, *inter alia*, "an expressed or implied agreement between the employer and the employee to exclude such time." Under 29 C.F.R. § 778.114(a), an employer may apply a fluctuating workweek methodology to calculate an employee's overtime entitlement, but only "[w]here there is a clear mutual understanding of the parties that the fixed salary is compensation . . . for the hours worked each workweek, whatever their number."

an agreement to settle a wage dispute between an employer and an employee which did not comply with § 216(c) "would be in clear derogation of the letter and spirit of the FLSA").

The provision set forth in § 207(o)(2) pertaining to comp time agreements has only been interpreted, consistent with its plain language, to constitute a *threshold* prerequisite governing an employer's decision to *provide for* comp time. *See, e.g., Moreau*, 500 U.S. at 34 n.16, *Nevada Employees' Association v. Bryan*, 916 F.2d 1384 (9th Cir. 1990); *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 498 U.S. 878 (1990); *Local 2203 v. West Adams*, 877 F.2d 814 (10th Cir. 1989); *Local 2961, IAFF v. City of Jacksonville*, 685 F. Supp. 513, 522 (E.D.N.C. 1988) ("an agreement is required in order for [an employer] to take advantage of the FLSA's compensatory time off feature as opposed to making monetary overtime payments"). Nothing in the plain language of Section 207(o)(2) references, or even contemplates, an "agreement" by which an employer could force its employees to use their accrued comp time. Construing the language of § 207(o)(2) narrowly, it necessarily follows that agreements purporting to allow forced usage of comp time are not allowed under § 207(o).

This conclusion should not be affected by references to agreements governing the "preservation, use or cashing out of comp time" contained in the Department of Labor's regulations interpreting the comp time amendments. Specifically, 29 C.F.R. § 553.23(a)(2) provides that an agreement or understanding regarding comp time "may include other provisions governing the preservation, use, or cashing out of compensatory time *so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or under-*

standing is a violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o)" (emphasis added). The Secretary's regulations do not define the terms "preservation, use or cashing out." Nevertheless, the regulations set forth several examples of permissible agreements which would relate to the preservation, use and cashing out of comp time. *See, e.g.*, 29 C.F.R. § 553.23(a)(2) (agreements "may provide for any combination of compensatory time off and overtime payment in cash (*e.g.*, one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least 'time and one-half' is maintained"); 29 C.F.R. § 553.23(a)(2) (parties may agree to provide comp time for "certain hours of work only"); 29 C.F.R. § 553.23(c) (the employer "need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees"); 29 C.F.R. § 553.25(c)(2) (allowing agreement to "govern the meaning of 'reasonable period' "). Under the Secretary's regulations, the parties could also agree to a policy setting forth a cap for accrued comp time balances that is lower than the cap established by § 207(o)(3)(A). There is no suggestion in the Department of Labor regulations that a forced usage agreement would be allowed under the FLSA.

Moreover, as previously demonstrated, interpreting § 207(o) to allow for forced usage would thwart the legislative purposes of the FLSA by allowing employers to avoid their obligation to compensate their employees in cash overtime, and would eviscerate the requirement under § 207(o)(5) that employers grant employee requests to use comp time. This outcome would be no different simply because an employer is required to obtain an "agreement" with an employee to allow forced usage. This conclusion is based upon the considerable deference that courts have shown to employers in finding the existence of agreements under other provisions of the FLSA. For instance, some courts interpreting 29 C.F.R. § 553.222(c), which requires employers to establish the existence of an agreement as a condition of excluding its employees' sleep time, have concluded that such "agreements" exist based upon nothing more than the fact that these employees were aware of their salary and hours and did not quit their jobs. *See, e.g., Bodie v. City of Columbia, S.C.*, 934 F.2d 561, 564 (4th Cir. 1991) (agreement evidenced by employee's admission to continuation of employment with " 'at least some awareness of the [exclusion] policy' ") (quoting *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987)); *Rotondo v. City of Georgetown, S.C.*, 869 F. Supp. 369, 376 (D.S.C. 1994) (mere acceptance of a paycheck by fire fighter manifests acceptance of the sleep time exclusion, "in spite of any pre-employment lack of knowledge of the exemptions and in spite of any post-hired expressed objections once becoming aware of the exemptions"); *Morehead v City of Pearl, Miss.*, 763 F. Supp. 175, 177 (S.D. Miss. 1990) (holding that city could lawfully "use[] as an example" and "treat[] unfairly" a firefighter who had initially refused to agree to sleep time exclusion by scheduling him to highly irregular shifts, "until he decided to either accept the [exclusion], or to go find employment elsewhere"); *Harrison v. City of Clarksville, Tenn.*, 732 F. Supp. 810, 814 (M.D. Tenn. 1990) (granting employer's motion for summary judgment because "[u]nder the FLSA, an employee's continued employment and acceptance of pay is evidence of the employee's implied agreement to certain practices, terms and conditions of employment").

The foregoing cases inspire little confidence that merely imposing a requirement that an employee "agree" to forced usage will ensure that the legislative purpose of the FLSA will not be undermined by allowing this practice. Courts might allow employers simply to announce a forced usage policy to establish an "agreement" with its employees to permit forced comp time usage. Indeed, these cases demonstrate that an "agreement" requirement does little to remedy the unequal bargaining power between employers and employees which necessitated passage of the FLSA. The only way to ensure that Congress' goals in enacting the FLSA continue to be realized in the public sector is to prohibit the forced usage of comp time, without respect to the existence of an "agreement" on this issue.

CONCLUSION

For the foregoing reasons, *amicus curiae,* the International Association of Fire Fighters, respectfully urges this Court to reverse the decision of the Court below.

Respectfully submitted,

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No. 98-1167

In The

Supreme Court of the United States

EDWARD CHRISTENSEN, et al.,

Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1 AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed by the Spokane Valley Fire Protection District No. 1, a public employer and political subdivision of the State of Washington. Spokane Valley Fire Protection District No. 1 is also the employer in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), *petition for cert. filed and pending* (October 5, 1999). The parties to this case have consented to the filing of this brief as provided in the rules of this Court.[1]

SUMMARY OF THE ARGUMENT

The issue before the Court is the meaning of 29 U.S.C. § 207(o)(2)(A)(ii), part of the 1985 Amendments to the Fair Labor Standards Act of 1938: Must a public employer – to implement and maintain a lawful compensatory time program – have a pre-existing agreement or understanding with respect to every term and detail of the program? Specifically, must there be an agreement on the precise point whether the employer can direct the use of compensatory time to keep accrued liability for such time below a pre-determined level?

The Court should note several key points at the outset. First, Petitioners (and three of their four amici) now concede that the FLSA, as amended, permits public employers to direct the use of compensatory time. Their

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the amicus curiae, has made a monetary contribution to the preparation or submission of this brief.

sole remaining contention at this point is that a detailed agreement expressly preserving this particular right must pre-exist such a direction.

Second, there is nothing special about the power to direct the use of compensatory time; it is not a unique type of discretionary act. Petitioners thus urge on the Court an interpretation which would arguably apply equally to nearly ***any*** term, policy or detail of a public employer's compensatory time program. Taken to its logical conclusion, Petitioners' argument is necessarily that Subsection 7(o)(2)(A)(ii) of the FLSA requires public employers to obtain prior, express, employee agreement to each and every term and provision of a compensatory time plan.

This argument is inconsistent with the purpose and language of the FLSA, which Petitioners misconceive. The Act at its core contains mandatory minimum wage and overtime provisions, invariable by agreement. To provide relief to the states and their subdivisions from the burden of these requirements, Congress enacted the 1985 amendments precisely to permit flexible compensatory time plans in the public sector. Aside from the requirement that compensatory time be calculated at time and one-half and subject to an upper limit, Congress left the details of the plans to employer discretion, subject only to notice and to "agreement" as that term is understood in the Act. The FLSA contains no other restrictions on employer discretion in the operation of comp time plans and none were intended.

Having now conceded that public employers may lawfully order the use of compensatory time pursuant to

agreement, Petitioners and their amici apparently fail to grasp what an "agreement" under the FLSA is. As intended by Congress and as made clear by the DOL regulations, the FLSA allows public employers in states like Texas to institute compensatory time programs unilaterally. Employers like Harris County may make compensatory time programs "an express condition of employment." Thus the only "agreement" the FLSA requires is the employee's deigning to work knowing that that the County administers a comp time program consistent with the express requirements of the FLSA.[2]

This verity is fatal to Petitioners' appeal, because it forces them to the untenable argument that although an employer like Harris County can make its comp time program as a whole a condition of employment and enforce it as to anyone who comes to work there, those same employees could reject particular details of the plan (to wit, the provision allowing the employer to direct the use of comp time) and render those provisions unlawful under the FLSA.

---

[2] The International Association of Firefighters, in their *amicus* brief, ***do*** recognize that this term, under the FLSA, essentially contemplates unilateral imposition of compensatory time plans by employers, requiring employees in states like Texas to quit or accept the plan. IAFF Br., Section II. This undoubtedly explains why the IAFF argues mightily – though without support in the language of the FLSA, in its legislative history, or from Petitioners themselves – that the FLSA prohibits public employers to direct the use of compensatory time even ***with*** agreement.

The Court need take the analysis no further to decide the present dispute. Under the stipulated facts, Petitioners received advance notice not only of Harris County's overall compensatory time plan, but also of the specific policy under which the County intended to direct the use of compensatory time to keep accruals below pre-determined maximum levels. Petitioners do not contend that this notice was deficient under the FLSA. And they continued to work for the County. Under the Act, this operated as acceptance of the compensatory time plan and all of its specific features, and is all the "agreement" the Act requires.

This is the correct result. There were good reasons that Congress intended to empower public employers in states without collective bargaining to make compensatory time programs an "express condition of employment." If each individual employee could opt out of the program at his or her discretion the goal of promoting employer flexibility in these states would be seriously undermined. The regime apparently urged by Petitioners, under which individual employee consent would also be required for each and every detail of a comp time program, would be an unmanageable nightmare for public employers, requiring either a patchwork of hundreds of individual, and potentially varying, agreements or, more likely, the forced abandonment of comp time altogether.[3]

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[3] In states permitting public employees to organize, such as the state of Washington, *see Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), a duty of good faith bargaining intermediates the process of agreement but still ultimately permits enforcement of a uniform policy as to all employees, whether they object individually to features of the policy or not. See Section II.B., infra.

And more broadly, the central purpose of the 1985 amendments was to increase public employer flexibility and to moderate the requirements of the FLSA in the public sector. To this end, Congress authorized compensatory time plans, requiring only that they be established in advance, that compensatory time be accrued at time and one-half, and that employee requests to utilize the time be granted except where doing so would cause undue hardship. As both the Fifth and Ninth Circuits have recognized, the Act places no other restrictions on employer discretion, and certainly no restriction forbidding employers to direct the use of compensatory time to keep accruals below pre-determined maximum levels. The Fifth and Ninth Circuits have properly concluded that to imply such a restriction would undermine the employer flexibility Congress so plainly intended to preserve. This Court should reach the same result, which best comports with the plain language of the FLSA, with the flexibility intended by the 1985 amendments, and with the delicate balance between Congressional power and state sovereignty that underlies FLSA jurisprudence.

ARGUMENT

I. UNDER THE STIPULATED FACTS, HARRIS COUNTY HAD "AGREEMENT," WITHIN THE MEANING OF THE FLSA, TO ITS COMPENSATORY TIME PLAN, INCLUDING A SPECIFIC POLICY PERMITTING THE COUNTY TO DIRECT THE USE OF COMPENSATORY TIME

Under Section 207(o)(2), a public employer wishing to institute a compensatory time program may do so either (i) pursuant to a "collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees" or (ii) in states, like Texas, where public employees may not have bargaining representatives, pursuant to individual agreements with the employees.

Specifically, Section 7 provides, in relevant part:

> Compensatory time
>
> (1) Employees of a public agency which is a . . . political subdivision of a State . . . may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. . . .

29 U.S.C. § 207(o).

In states like Texas, which do not authorize public sector collective bargaining, employee agreement to a compensatory time system is analyzed under Subsection 207(o)(2)(A)(ii). *Moreau v. Kelvenhagen*, 508 U.S. 22, 113 S.Ct. 1905, 123 L.Ed. 2d 584 (1993). As intended by Congress and confirmed by the regulations issued by the Department of Labor, employers instituting compensatory time programs under this subsection may require their employees to agree to compensatory time "as an express condition of employment" provided the employee or applicant has notice of the program and is specifically informed that accrued comp time may be "preserved, used or cashed out consistent with" the FLSA. 29 C.F.R. § 553.23(c)(1); H. R. Rep. No. 331, 99th Cong., 1st Sess. 20 (October 24, 1985) ("The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of this new subsection.") (under Section 207(o)(2) "[c]ompensatory time would be allowed pursuant to an agreement, . . . ***or with prior notice to the***

employees") (emphasis added); S. Rep. No. 150, 99th Cong., 1st Sess. 11 (1985) (same).

In other words, a Texas employer who decides to implement or maintain a compensatory time program satisfies the "agreement" requirement of Subsection 207(o)(2)(A)(ii) by giving its employees notice that use of comp time will be a "condition of employment" and that the program will be administered in conformance with the express provisions of Section 207(o). Any employee who receives such notice and then either accepts or continues employment thereby manifests the "agreement" required by the FLSA.

Though the details are not set out in the stipulated facts, Petitioners themselves contend that this is precisely what happened in Harris County. Following enactment of the 1985 Amendments, the County unilaterally implemented a compensatory time system, thereby making agreement to the compensatory time program an express condition to employment in the sheriff's department. Pet. Br. at 16-18. Some of the deputies objected to ***any*** compensatory time system and challenged the Department's comp time program – unsuccessfully – all the way to this Court. *Id.*; *Moreau*, 508 U.S. 22. Because these deputies chose to remain employed with the Department, their only option was to argue that Subsection 207(o)(2)(A)(ii) did not apply to them or the Department. This Court rejected that argument.

As noted earlier, Petitioners and the United States concede that a public employer may lawfully direct the use of compensatory time if there is a prior "agreement" to that effect. Pet. Br. at 25; United States Br. at 19 n.10.

Under the language of the FLSA and the stipulated facts, such an agreement existed here and the Court can resolve this case without even deciding whether the "agreement" must include a detailed provision preserving employer discretion to direct comp time usage. Here the County plainly provided advance notice of its policy: "[i]t is the policy of the Harris County Sheriff's Department that the compensatory time of employees, . . . will be maintained below a predetermined maximum level." Not only was this general policy known by the employees, in specific instances where it might be applied, the employee was given advance notice "that he or she is nearing the maximum number." Petitioners do not argue that this notice is deficient under the FLSA.[4] Accordingly, individual employees who objected to this specific policy had the same option as any employee who objected generally to the comp time plan as a whole: they could resign or continue to work.

Having continued to work after receiving all required notice, Petitioners agreed to the policy under the FLSA. The Court's analysis need proceed no further than this point. Petitioners' appeal should be rejected.

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[4] Petitioners might conceivably argue that once a comp time plan is implemented, modifications to the plan are impermissible without some greater "agreement" than was necessary at the outset. While it is true that vagaries of state law might affect an employer's ability to make unilateral changes in established policies or past practices (likely the case, for example, in states that permit public employee bargaining) there is nothing ***in the FLSA*** requiring an employer to obtain new agreement every time the comp time program is amended. Rather, all that is required is notice, followed by employee decisions to continue working. 29 C.F.R. § 553.23(c).

II. EVEN IF HARRIS COUNTY HAD NOT ARTICULATED ITS POLICY IN THIS LEVEL OF DETAIL, IT WOULD STILL HAVE RETAINED THE DISCRETION UNDER THE FLSA TO DIRECT THE USE OF ACCRUED COMPENSATORY TIME

Even assuming Harris County had not issued its specific policy indicating that it would direct the use of compensatory time to keep accruals below certain maximums, the County would still have retained the authority to issue such directives. As both the Fifth and Ninth Circuits have recognized, this conclusion flows from at least two sources: 1) the underlying common law powers of employers to direct their work forces and manage their affairs; and 2) the absence of any language in the FLSA suggesting that Congress intended to restrict these powers by forbidding employers to direct the use of compensatory time.

Petitioners ground their argument to the contrary on Subsection 207(o)(2)(A), which includes the only "agreement" requirement of the 1985 Amendments. Petitioners contend that this Subsection requires more than just a general agreement to a compensatory time program. The agreement, they assert, must specifically set forth the employer's reservation of the right to direct the use of compensatory time.

Petitioners' contention fails for at least two reasons. First, Congress plainly knew how to constrain employer discretion when enacting the FLSA and its amendments. Congress did so explicitly in numerous mandatory provisions of the Act – minimum wage, for example – which are invariable by agreement. Nothing in the language or

legislative history of the Act suggests that Congress intended to prevent employers from directing employees to use up some of their compensatory time. To the contrary, Congress plainly intended to increase, rather than decrease, public employer flexibility through adoption of the provisions at issue. This argument is developed in detail in the Fifth and Ninth Circuit decisions, as well as in the brief of Harris County before this Court, and need not be reiterated here.

Second, because employers in a state such as Texas can impose the overall compensatory time plan as a condition of employment, it is simply illogical to conclude that Petitioners could avoid compliance with the fine points of the plan by objecting to them singularly. Spokane County develops this argument below.

A. The Plain Language of the FLSA Contemplates General and Informal, Rather than Specific and Formal, Understandings with Respect to Compensatory Time

The 1985 Amendments to the FLSA provide that a public employer wishing to provide compensatory time in lieu of overtime compensation may do so either (i) pursuant to a "collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees or (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and the employee before the performance of the work . . . " 29 U.S.C. § 207(o)(2)(A).

Nothing in this language suggests that such agreements must include in advance every possible detail or fine point of the comp time program. Nor do the regulations indicate that customary employer discretion is destroyed unless the employer is both prescient and precise. Rather, the DOL regulations indicate that this provision is satisfied by something as simple as an "understanding" or even an "oral" agreement, and they further provide that more specific detail is wholly permissive. 29 C.F.R. § 553.23(b). Such agreements ***"may"*** include any number of specific details. 29 C.F.R. § 553.23(a)(2).

Section 207(o)'s omission of any reference to a need for detailed employee agreement is most properly interpreted to mean that general agreement, as provided by Subsection 207(o)(2)(A), to a compensatory time program is all the FLSA requires. It is hardly a stretch to conclude that Congress intended the details of public employer comp time programs to be worked out just like any other workplace dispute not covered by federal law – that is, according to the governing laws of each of the 50 states.

B. Because Employers Such as Harris County Can Lawfully Make Compensatory Time Programs in General a Condition of Employment, Employees Cannot Logically Possess Veto Power over the Lesser Details of the Plan

Having failed to find language in the Act forbidding employers to direct the use of compensatory time, Petitioners and the United States attempt to avoid the effect

of the FLSA's deafening silence by invoking the following syllogism.

> Under "the FLSA, any authority an employer might have to adopt a compensatory time program now derives solely from the voluntary agreement of the employees, not from any inherent power of the employer to prescribe the terms of employment. If employees withhold agreement, they retain an undisputed right to premium pay rather than compensatory time. . . .
>
> [a]n employee's greater power to insist on monetary compensation for all overtime includes a lesser power to accrue compensatory time as he or she wishes . . . "

United States Br. at 8 and 14. In other words, because an employee may withhold consent to participate in a comp time program at all, he or she may also withhold consent as to any details of such a program.

While it is true generally that a greater power implies a lesser, the Solicitor General has the situation backwards. In Texas, it is the public employer, not each individual public employee, who determines unilaterally whether to have a comp time program. The employee can consent or not. But under the FLSA, if the employee decides to withhold consent, ***the employer does not cancel the program.***[5] ***The employee decides to work elsewhere.*** In other

---

[5] Of course, if enough applicants or current employees objected to a comp time program, even public employers who may choose to make comp time an "express condition of employment," might abandon it. Though, in such a case, the

words, Subsection 207(o)(2)(A)(ii), as intended by Congress and as interpreted by the Department of Labor, assigns the greater power to the public employer, not to the individual employee. The more apt syllogism is this: Under Subsection 207(o)(2)(A)(ii), employees, like Petitioners, who accept or continue employment with an employer that uses comp time as an express condition of employment may not then object to the use of comp time as a general matter. It therefore follows that this same employee cannot further object under the FLSA to specific details about the employer's program. In other words, whether the objection is general or specific the remedy under the FLSA is the same: resign or reject the job offer.

Furthermore, this same ultimate authority to implement a compensatory time program largely obtains even in states that permit public employee bargaining. Most states do permit such bargaining. James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 Geo. Mason L. Rev. 1, 21 (1996). Spokane Fire District No. 1, defendant in *Collins v. Lobdell*, is located in Washington State, which allows public employees to organize, identify an exclusive representative, and bargain collectively pursuant to the State's Public Employees' Collective Bargaining Act, RCW 41.56. To govern this process, Washington generally follows the principles, structure, and precedent established by and under the National Labor Relations Act. *See, e.g., Pasco Police Officers' Ass'n v. City of Pasco*, 132

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decision would presumably be prompted by market or in-state political forces, not in response to the FLSA veto power Petitioners claim here.

Wn.2d 450, 459, 938 P.2d 827, 832 (1997); *Vancouver Sch. Dist. No. 37 v. Service Employees Int'l Union, Local 92*, 79 Wn. App. 905, 917, 906 P.2d 946, 952-53 (1995).

According to this well-developed body of law, once a group of public employees has selected and the state has certified an exclusive representative, the employer has a duty to bargain in good faith over terms and conditions of employment – the so-called mandatory subjects of bargaining. RCW 41.56.040, 41.56.060, 41.56.100; *see also Pasco*, 132 Wn.2d at 460. Where agreement is reached, and a majority of the voting employees in the collective bargaining unit ratify it, the agreement becomes binding on the unit as a whole, including those employees who voted against ratification.

When agreement is ***not*** reached, and the employer has negotiated in good faith to impasse, it may, subject to some timing limitations, implement its final offer. *See generally* 1 Patrick Hardin, *The Developing Labor Law* 692 (3d ed. 1992). If they wish, employees may withhold their labor by striking. *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 379, 831 P.2d 738, 740 (1992). The employers may temporarily – and eventually permanently – replace the strikers and hire new employees willing to accept the implemented terms and conditions.[6]

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[6] If the employer were to insist to impasse on an illegal provision – such as one permitting it to, for example, refuse to hire women, or to pay less than the minimum wage required by the FLSA, employee objections would be protected from retaliation. RCW 41.56.050. Thus an employer could not discharge and replace strikers protesting the illegal provision.

In the "uniformed" services – generally police and fire – Washington modifies these general principles and forbids strikes because of the powerful state interest in ensuring uninterrupted protection of public safety. RCW 41.56.430, 41.56.490. Because police officers and firefighters are denied the primary economic weapon of labor – the ability to withhold services by striking – the legislature also forbade their employers to lock the employees out or to implement final offers in bargaining. *Id.* Instead, when impasse is reached on any lawful mandatory subject, a neutral third party arbitrator determines the appropriate contract through the contested process of interest arbitration. RCW 41.56.440, 41.56.450.

So, in Washington, a public employer seeking to institute a compensatory time plan must offer it as a contract proposal, must negotiate in good faith with the employees' exclusive representative, and must reach a lawful impasse before the plan can be implemented as a final offer. Employees who object may strike because they object to the plan and may, if they persist and the employer does as well, ultimately be replaced by new employees willing to accept the plan. In the uniformed services, the employer must similarly bargain to impasse, and must then convince an interest arbitrator to include the plan provisions in the final contract. If successful, the employer may then utilize the plan despite the objections of the Union.

Thus, the ultimate principle that an employer offers conditions of employment, and employees accept those conditions by coming to work, obtains for most purposes in collective bargaining states like Washington as it would in Texas. At bottom, an employer who negotiates

in good faith to impasse may ultimately impose a comp time plan and may retain only those employees willing to accept it. In the police and fire arena, the same result may be reached over employee objections if an interest arbitrator includes the comp time provisions in the "agreement" he or she ultimately imposes. In either case, there will be many situations where public employees, even when they constitute a majority, may be required to accept a comp time plan though they object to it, in whole or in part.

The FLSA plainly recognizes and permits these various outcomes. Hence, Subsection 207(o)(2)(A) provides that a comp time plan may be implemented pursuant to a collective bargaining agreement. Nothing in Section 207(o) suggests that in providing that comp time could be instituted pursuant to a collective bargaining agreement, Congress intended to impose the additional requirement that all, or even a majority of employees, expressly consented to the plan.[7] Rather, Congress's obvious intent was to allow public sector employers and employees to reach agreement on their comp time programs in the same way as the reached agreement on other issues – through the applicable state's normal collective bargaining process.

Again, because the FLSA would permit implementation of a comp time program pursuant to a collective bargaining agreement even where state law provided mechanisms for such a program to be implemented over the objections of some, or even all, of the employees, it necessarily follows that the FLSA does not impose any

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[7] Of course, as a practical matter, that will usually be the case. As Congress repeatedly recognized, comp time plans are popular with most employees.

special requirement for express employee consent to the individual terms of such plans. It is simply illogical to conclude, as Petitioners and the Solicitor General do, that while specific consent is ultimately unnecessary to a compensatory time plan as a whole, specific assent is necessary on a minor subtopic of the plan – namely, the finer point of whether the employer can compel utilization of the comp time.

Petitioners may, of course, concede that even though all this may be true, the employer must still identify this particular act of discretion in its notice to employees (in Texas and similar states) or in its collective bargaining proposal (in Washington and its brethren.) At this level, Petitioners' argument becomes impossibly technical. The FLSA contains no express restriction preventing employers from ordering the use of compensatory time. Carried to its logical conclusion, Petitioner's argument would require public employers to anticipate a limitation imposed *silently* by the FLSA, then to preserve the discretion they had no notice they had lost by inserting specific language in this regard.

If this were the rule, compensatory time plans would quickly come to resemble the Prussian Legal Code. Congress cannot have intended this result in amendments whose principal objective was to preserve public employer flexibility and ease compliance with the FLSA. Further, this argument would have implications well beyond the present issue. What other areas of customary employer discretion did Congress intend silently to restrict? What other traditional management powers must public employers state expressly in order to preserve them against silent destruction? Must employers

spell out every detail of a compensatory time plan to render it valid?

It is far more likely that Congress intended the sensible result that employers preserve their normal discretion to operate except where Congress explicitly restricted that exercise – by requiring a minimum wage, for example. Congress did not do so in this area and public employers therefore should remain free to exercise their customary management powers. The Fifth and Ninth Circuits correctly arrived at this result and this Court should do so as well.

C. Consistent with the Principles of Federalism, this Court Should Interpret the FLSA to Restrain, Rather than Expand, Its Impact on the States and their Subdivisions

The principles of federalism rooted in the Tenth Amendment counsel that the FLSA be construed to provide public employers maximum flexibility in managing the levels of accrued compensatory time, subject only to the single constraint found in 29 U.S.C. § 207(o)(5). Although Congress does have some ability to regulate state functions, the Tenth Amendment imposes a broad restriction on this ability:

> Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly. . . . If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language

> of the statute. . . . In the case of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions. . . .

Gregory v. Ashcroft, 501 U.S. 452, 460, 470 (1991) (citations omitted) (refusing to read the Age Discrimination in Employment Act to apply to state court judges because such an intent was not clearly expressed in the statute); *see also McNally v. United States*, 483 U.S. 350, 360 (1987) (federal statutes should not be construed in a manner to infringe on states' abilities to regulate state officials without a clear intent from Congress). Accordingly, the Court must narrowly construe statutes encroaching on state functions to ensure that regulation of state functions by the federal government does not exceed that allowed under the Tenth Amendment. Because Congress has not clearly expressed an intent to prohibit public employers from requiring employees to use accrued compensatory time if they refuse to do so voluntarily, as discussed above, FLSA cannot be interpreted to outlaw the practice.

Further, because the issue of whether FLSA is even constitutional as applied to state and local governments is a close one, it should be construed narrowly in this context. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that as applied to traditional state governmental functions, FLSA violated the Tenth Amendment, infringing on state sovereignty. A mere nine years later, the Court reversed itself in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The *Garcia* decision was reached by the slimmest of margins in a 5-4 vote, with the dissenters arguing that the majority's opinion did not comport with the principles of federalism embodied in the Constitution. This counsels against an

expansive reading of FLSA as applied to state and local governments: the FLSA should be construed to provide state and local governments maximum latitude in making determinations about wages and hours of their employees, to the extent consistent with the plain language of the statute.

Additionally, some members of Congress believed that *Garcia* was wrongly decided and improperly intruded on states' rights. *See, e.g.*, 131 Cong. Rec. S14044 (daily ed. Oct. 21, 1985) (statements of Sens. Thurmond and Symms); 131 Cong. Rec. S11081 (Sept. 9, 1985) (statement of Sen. Helms); 131 Cong. Rec. S11033 (Sept. 9, 1985) (statement of Sen. Symms); 131 Cong. Rec. S9495 (July 15, 1985) (statement of Sen. Symms). The result was that the 1985 compensatory time amendment was enacted as compromise legislation. *See, e.g.*, 131 Cong. Rec. H9235 (daily ed. Oct. 28, 1985) (statements of Reps. Murphy and Hawkins); 131 Cong. Rec. S14044 (daily ed. Oct. 21, 1985) (statement of Sen. Thurmond). Such indications of Congressional concern over the perceived derogation of federalism in *Garcia* also advise against construing the amendments to broadly regulate areas of traditional state functions, if not explicitly stated in the statute. In sum, federalism dictates that limitations on state and local governments' ability to utilize compensatory time not appearing expressly in the FLSA should not be imposed by judicial fiat. Both the Fifth and Ninth Circuits observed precisely this restraint.

Unwarranted preemption of the states' dispute resolution processes applicable to public employees also will result if this Court inflicts restrictions on public employers' use of compensatory time, other than as

expressly provided in FLSA. The vast majority of public employees to whom this Court's ruling will apply are represented and covered by collective bargaining agreements or subject to civil service rules, as provided under state law. Under either type of scheme, the method for resolving differences concerning interpretations of agreements or employment practices is through arbitration or other dispute resolution process, not through the federal courts.

This Court should proceed with all due caution before adopting a rule that would potentially remove many of these day-to-day labor disputes from the state and local tribunals and other dispute resolution procedures specifically designed to resolve them, and bring them instead into federal court as claims under the FLSA.

It takes no great stretch of imagination to envision the kinds of disputes that could be turned into FLSA claims under Petitioners' interpretation. Any dispute even touching on comp time would become an invitation to forum shopping of the worst kind. For example, suppose during a flu epidemic, a public employer temporarily required employees to provide 48-hours advance notice for non-emergency absences. The employer's position is that the collective bargaining agreement allows such temporary measures. The union disputes the employer's interpretation, and further notes that non-emergency absences might also impact the use of comp time. Ordinarily, this would be a run-of-the-mill collective bargaining dispute apt for resolution under normal state grievance or arbitration procedures specially developed to resolve it. However, under Petitioners' position, the union would be able to chose between the customary

state forum, or it could bring an FLSA claim in federal court, where it would claim that the employers' failure to obtain express agreement on this particular detail violated the FLSA. Similar scenarios would likely result from any number of areas of traditional workplace disputes.

It is impossible to glean any Congressional intent to create such a wide displacement of state law dispute resolution in Section 207(o). Rather, in enacting the 1985 Amendments, Congress was clear in what it intended to bring within the ambit of the FLSA. Thus, at least five types of disputes that may be properly brought in federal court under the FLSA:

- whether employees are receiving comp time "at a rate not less than one and one-half hours for each hour of employment," 29 U.S.C. § 207(o)(1);
- whether the comp time program was adopted pursuant to collective bargaining, some other agreement, or, where the program is an "express condition of employment," whether it was adopted with appropriate notice, 29 U.S.C. § 207(o)(2);
- whether employers are using comp time beyond the statutory maximums, 29 U.S.C. § 207(o)(3)(A);
- whether cash payments for comp time are made at the appropriate wage rates, 29 U.S.C. § 207(o)(3)(B) and 29 U.S.C. § 207(o)(4); and
- whether employees are being properly allowed to take time off. 29 U.S.C. § 207(o)(5).

These provisions plainly demonstrate that Congress was capable of identifying with precision those mandatory requirements employers were to observe. Notably, Congress did not include a prohibition on employer-directed use of compensatory time, nor on the many other imaginable details that might attend compensatory time plans. This strongly suggests that Congress intended disputes over such details to be resolved at the state level, under state law. This is consistent with this Court's holding in *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), where the Court looked to state law to determine the meaning of "representative" under Subsection 207(o)(2)(A).

D. Neither the FLSA Nor the 1985 Amendments Are Designed to Protect the Interests of Employees Who Want to Manipulate a Comp Time Plan by Refusing to Schedule Time Off

Perhaps the most strained argument of all is Petitioner's contention that allowing employees a unilateral veto over policies to manage comp time liabilities best meets the purposes of the FLSA and the 1985 Amendments. Petitioners, by their own account, are employees who have always objected to compensatory time in lieu of premium pay but were required to accept it as an "express condition of employment." *See* Petitioners' Br. at 16. Their intention is clear. They want to amass and then maintain the statutory maximum of comp time so that they can require the Harris County Sheriff's Department

to pay cash premiums for future overtime.[8] In other words, Petitioners are a group of employees who want to work, on average, more than 40 hours per week, and when they do so, they want to receive premium pay. This is not the profile of the employee Congress was concerned with when it enacted FLSA or when it adopted the 1985 Amendments.

The Fair Labor Standards Act, enacted in 1938, grew out of the economic devastation of the Great Depression. The purposes of FLSA were to create a minimum wage standard to prevent wage exploitation, to promote fair competition in interstate commerce, and to generate additional jobs. With respect to the latter purpose, Congress believed that requiring overtime pay for hours greater than the maximum contained in the statute would encourage employers to hire more workers, employing each employee for fewer hours. *See* H. R. Rep. No. 1452 (1937); *see also* S. Rep. No. 884 (1937); H. R. Rep. No. 2182 (1938); Conf. Rep., H. Rep. No. 2738 (1938).

> The purpose [of FLSA] was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra

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[8] This was precisely the same kind of manipulation attempted by the Spokane County employees who brought the action in *Collins v. Lobdell*. There, the employer agreed to permit the firefighter employees to perform certain tasks rather than contracting them out. The understanding from the outset was that these tasks would be performed for compensatory time and not for cash. A number of employees refused to utilize their compensatory time as it accrued. Absent power to direct the use of some of the accrued comp time, this would have forced the employer to a Hobson's choice: leave the work undone, or pay unbudgeted cash for it. *Collins v. Lobdell*, 188 F.3d at 1126.

> work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost. The statute by its terms protects the group of employees by protecting each individual employee from overly long hours.

Bay Ridge Operating Co., Inc., 334 U.S. 446, 459 (1948); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 796 (1945) (FLSA enacted "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."); *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577 (1942) (a fundamental purpose of FLSA was to reduce unemployment by reducing hours of work; "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning.").

In sum, the ideal of the FLSA is the 40-hour workweek. For obvious reasons, this goal is difficult to achieve in the public sector, especially with emergency services like police and fire protection. Unanticipated emergencies like the Rodney King unrest in Los Angeles, natural disasters, and unique events like the millennial celebrations, or the WTO protests in Seattle, inevitably mean that there will be weeks when the men and women who make up the police forces and fire departments of this nation will be called upon to work more than 40 hours. Comp time does not eliminate this, but it does allow for the employee and employer to strive for a 40-hour ***average***.

Thus, the employee who works 60 hours fighting fires one week restores the balance, and furthers Congress's intent, by working ten hours the next week, 30 hours the next three weeks, or by taking time off in any other combination. Congress's intent of promoting the goal of the 40-hour workweek is frustrated, not furthered, by employees like Petitioners who work the overtime, but then refuse to take any time off.

The other interests Congress sought to further in enacting the 1985 Amendments to the FLSA are hardly opaque. Plainly the driving factor was the concern about the costs imposed by application of the FLSA to states and their subdivisions. At the time the Amendments were passed, these costs were estimated at "between $0.5 billion and $1.5 billion nationwide." *See* H.R. Rep. 331 at 9, *supra*. The Amendments were designed to allow the States and their subdivisions additional flexibility in meeting their "special responsibilities in promoting the public good." *Id.* at 17. At the same time, Congress was plainly cognizant of the interests of public employees. Congress' chief concern in this regard was that employees should be able to use their comp time they accrued. Accordingly, Congress spoke of seeking "to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations." *Id.* at 21. There was also concern that employees might run up comp time balances that were so great they would not be able to use them. *Id.* Notably absent was any concern that employees might refuse to use the comp time they earned, or that if

they did so, such employees warranted special protections under the FLSA beyond those already available to them under state law.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 12th day of January, 2000.

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